4160/13

247 I.A. 613

98 - 31706

ODD MEYER, Appellee,	)	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
v.	)	
CAROLINA WOOD PRODUCTS COMPANY OF ILLINOIS, IRVING H. ISAACS and BEN LAUTERSTEIN, Appellants.	)	

Opiniom filed December 21, 1927.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal by the defendants, Carolina Wood Products Company of Illinois, Irving H. Isaacs and Ben Lauterstein, from the decree of the Chancellor ordering the Carolina Wood Products Company of Illinois, to make a full and complete accounting to the complainant, Odd Meyer, an alleged stockholder of the corporation, and appointing the Union Bank of Chicago as receiver of the Carolina Wood Products Company of Illinois.

The Carolina Wood Products Company of Illinois (hereinafter called the Illinois Company) was organized in July, 1925, with a capital stock of 100 shares of no par value, but with a paid in value of $500.00 per share. The complainant, Odd Meyer, subscribed for 25 shares, amounting to $12,500, and paid on his subscription $9500.00, with the agreement that the balance, $3,000.00, should be paid in merchandise. A certificate of stock was issued in his name for the full 25 shares, bearing date July 1, 1925. The certificate of stock was not delivered to him at that time

98 - 31708

COOK COUNTY,

Appellee,

v.

CAROLINA WOOD PRODUCTS COMPANY OF ILLINOIS, IRVING H. ISAACS and BEN LAUTENSTEIN,

Appellants.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

Opinion filed December 21, 1927.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

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The Carolina Wood Products Company of Illinois (hereinafter called the Illinois Company) was organized in July, 1926, with a capital stock of 100 shares of no par value, but with a paid in value of $500.00 per share. The complainant, Odd Meyer, subscribed for 25 shares, amounting to $12,500, and paid on his subscription $6500.00, with the agreement that the balance, $6,000.00, should be paid in merchandise. A certificate of stock was issued in his name for the full 25 shares, bearing date July 1, 1926. The certificate of stock was not delivered to him at that time

because he still owed the Company $3,000.00 of his subscription. Since that time, the stock certificate has been continuously in the possession of the corporation. Nothing was said as to the holding of the certificate, except there was, apparently, an understanding that as soon as the balance of $3,000.00 was paid, the certificate would be delivered.

The balance of the capital stock, being $37,500.00, was subscribed for by the defendants Isaacs and Lauterstein. They were residents of the City of New York, and owned and controlled three eastern corporations, known as the Carolina Wood Products Company of Delaware, Irving Furniture Factories, Inc., and the Federal Furniture Factories, Inc. of Delaware, all of which factories and their main offices in New York City, and their factories at Asheville, North Carolina. The Illinois Company was incorporated to establish a wholesale warehouse in Chicago to distribute in Chicago and vicinity the products of the three above mentioned eastern companies. Lauterstein and Isaacs paid for their subscriptions to the Illinois Company with merchandise shipped from the factories of the eastern companies. Lauterstein selected all the goods shipped to and fixed the prices paid by the Illinois Company.

Lauterstein, Isaacs and Meyer were elected as directors and officers of the Illinois Company, Meyer being president. After the incorporation of the Illinois Company, Meyer, in Chicago, hired a secretary, an auditor, and a man to take care of the warehouse, and undertook, with, a number of salesmen under him, to carry on the business for which the Illinois Company was organized. In the course of that work,

on behalf of the Illinois Company, he sold merchandise to, or got orders from, among others, the General Furniture Company, Mandel Brothers, The Davis Company and Weiboldts. It was agreed at the time the Illinois Company was formed that all the local orders for furniture coming from any source, should be credited to the Illinois Company, and that it should receive a certain per cent as commissions on all such sales. In the early part of 1925, Meyer complained that certain accounts were not being credited to the Illinois Company. On August 18, 1925, Lauterstein wrote to the complainant "Of course, the General orders will all be passed to the credit of the Chicago warehouse, as I told you originally, * * * So that there will be no confusion in billing, I have instructed the factory to continue to bill direct shipments to the General through this office and when they are all completed, we can then make settlement, as you will note the commissions are all being paid through this office to Schraeder and I do not want to confuse the records. * * * Any orders you send in from now on will be billed through the Chicago warehouse." The word "General" in the letter above mentioned refers to the General Furniture Company of Chicago.

It is the evidence of the complainant that an order for $40,000.00 worth of furniture in January, 1926, was not billed to the Illinois Company; that the Illinois Company received no credit on that sale, and that he had no evidence of a credit on the books of the Illinois Company concerning an order he got from Weiboldts. The evidence shows that certain orders which were obtained by the Illinois

on behalf of the Illinois Company, he sold merchandise to, or got orders from, among others, the General Furniture Company, Rachel Brothers, The Davis Company and Reibolds. It was agreed at the time the Illinois Company was formed that all the local orders for furniture coming from any source, should be credited to the Illinois Company, and that it should receive a certain per cent as commissions on all such sales. In the early part of 1928, Meyer complained that certain accounts were not being credited to the Illinois Company. On August 18, 1928, Lustersteln wrote to the complainant "Of course, the General orders will all be passed to the credit of the Chicago warehouse, as I told you originally. * * * So that there will be no confusion in billing, I have instructed the factory to continue to bill direct shipments to the General through this office and when they are all completed, we can then make settlement, as you will note the commissions are all being paid through this office to Schrader and I do not want to confuse the records. * * * Any orders you send in from now on will be billed through the Chicago warehouse." The word "General" in the letter above mentioned refers to the General Furniture Company of Chicago.

It is the evidence of the complainant that an order for $60,000.00 worth of furniture in January, 1928, was not billed to the Illinois Company; that the Illinois Company received no credit on that sale, and that he had no evidence of a credit on the books of the Illinois Company concerning an order he got from Reibolds. The evidence shows that certain orders which were obtained by the Illinois

Company were billed and shipped direct to the purchasers through one or more of the eastern factories. It is the evidence of Lauterstein that sales were made by the Illinois Company through the General Furniture Company, on which the Illinois Company never got any credit. He states, however, that he told Meyer that there were old orders and new orders, and that the new orders were of such small amounts that he thought it would be better, until they had all been completed, to continue to bill them as they had always billed them, direct. The books of the Illinois Company showed a charge made by the complainant of $1,250.00, being five per cent on estimated shipments to the General Furniture Company and Mandel Brothers. Meyer testified that that was his estimate of the sales.

On January 18, 1926, the business relations between Meyer, on the one hand, and Lauterstein and Jenace on the other, having become unsatisfactory, a meeting took place between the three, at which Lauterstein dictated a memorandum, which was presented to Meyer. Meyer refused to sign it. On the following day, another meeting was held and a memorandum, dictated by Lauterstein, was signed by Meyer, and, also, by the Illinois Company, by H. Lauterstein. That document is as follows:

> "Carolina Wood Products Co. of Ill. agrees to turn over to Odd Meyer the following accounts without recourse:
> Berwyn Upholstering & Furniture Shops --- $2139.33
> K. B. Furniture Co.---------- 2717.75
> as soon as 90% of present outstandings of Carolina Wood Products Co. of Ill. as covered by attached list of statements are collected. * * *
>
> The above are accounts as they now appear on the books of the Carolina Wood Products Co. of Ill. , and the Carolina Wood Products of Ill. assumes no responsibility as to the correctness of these accounts nor do they assume any responsibility for

company were billed and shipped direct to the customers, through one or more of the eastern factories. It is the evidence of businessmen that milk was sold by the Illinois company through the General Dairyman company, on which the Illinois Company never got any profit; in matters, however, that do not depend upon the evidence of witnesses, but on the testimony, but that the new courts were of such character that it would be believed, until they had all been convicted, to continue to bill them as they had always billed them, direct. The books of the Illinois Company showed a profit made by its subsidiary of $[illegible], being five per cent on outstanding shipments to the General Dairyman Company but unsold therein. Never publicly was that was the attitude of the union.

On January 12, 1920, the Wisconsin Dairyman appeared again, on the one hand, and Lindstrom and Jensen on the other, having found "unsatisfactory", a meeting had taken place between the three, at which Lindstrom directed a resolution which was presented to them. Never refused to sign it. On the following day, another meeting was held and a resolution adopted by Lindstrom, had signed by Jensen, and, also, by the Illinois Company, by W. Lindstrom. That document is as follows:

"Resolution from Twelve Co. of Ill. (Jensen) to give area to the Union for distributing producers milk product.

Green Bay, Wisconsin, January 12, 1920.

I, W. Lindstrom, President of Twelve Co. ---------- hereby, in the name of the Twelve Co. of Ill., as covered by certain product (Co. of Ill.) as covered by certain list of producers and allowed.

The above are accepted as they are, or not in the hands of the Twelve Co. (Co. of Ill.), and the Twelve Co. (Co. of Ill.) assume no responsibility as to the correctness of these producers and as to their reliability. The Twelve Co. (Co. of Ill.) assume no responsibility as to the correctness of these producers and as to their reliability.

their being collected.

Also Odd Meyer agrees to arrange with the Partridge Chair Co. to take over the stock of merchandise in our warehouse as per attached list on the basis of cost plus freight.

The Carolina Wood Products Co. of Ill. upon the above being carried out, agrees to give Odd Meyer a general release and Odd Meyer agrees to resign immediately as officer and director of the Carolina Wood Products Company of Ill. Odd Meyer now releases Carolina Wood Products Co. of Ill. from any and all agreements whatsoever."

It is the evidence of Meyer that on the day following the signing of the agreement, he had a conversation with Lauterstein and the Illinois Company's officers, in the course of which Lauterstein asked him to sign an assignment of his stock and told him if he did not sign it, the above mentioned agreement would be null and void; that he, Meyer, told Lauterstein that he would not sign anything.

After January 19, 1926, the Illinois Company ceased to transact further business, save that it undertook the disposition of the merchandise on hand and the collection of its accounts. Since January, 1926, no books of the corporation have been kept in the Chicago office.

On February 8, 1926, Lauterstein and Isaacs purchased at a bankruptcy auction, on behalf of the Carolina Wood Products Company of Delaware, a warehouse in Chicago, and gave in part payment therefor, at that time, a check of the Federal Parlor Furniture Company for $10,000.00, drawn on the American Union Bank of New York, signed by Kelly Goldboss. It is the evidence of Goldboss, an uncle of Lauterstein, that at the time he gave the check, he had no funds of any company in his

their being collapsed.

Also last paper signed by Grunage was the Portrage Chair Co. to take part the stock of warehouse in his warehouse as was attached like on the basis of each plus Trainch.

The Carolina Food Products Co. of III. upon the above being marked out, agrees to give his days a general interest and old layer agree to resign immediately as officer and director of the Carolina Food Products Company of Ill. and carry the Carolina Food Products Co. of Ill. from any and all grounds whatsoever.

It is the opinion of counsel that on the day following the signing of the agreement, he had a conversation with Lundstrom and the Illinois Company's officers, in the course of which Lundstrom asked him to sign an assignment of his stock and told him if he did not sign it, the above mentioned agreement would be null and void; that he, Joyer, held Lundstrom that he would not sign anything.

After January 19, 1926, the Illinois Company, acting to Grunage through counsel, made that it withdrew the disposition of the warehouse on hand and the cancellation of his commission. Since January, 1926, no books of the corporation have been kept in the Chicago office.

On February 4, 1926, Lundstrom and Jensen purchased at a bankruptcy auction, on behalf of the Carolina Food Products Company of Illinois, a warehouse in Chicago, and gave in part payment therefor, at that time, a check of the Federal Trust Purchasing Company for $1,000.00, drawn on the Lincoln Park Bank of New York, signed by Kelly Dalhouse. It is the opinion of counsel, in spite of Lundstrom, that at the time he gave the check, he had no funds of his company in his

hands or possession; that a deposit was made by the Carolina Wood Products Company of Delaware, in New York, with the American Union Bank, to cover the check for $10,000.00; that the price paid by the Carolina Wood Products Company of Delaware for the property was $45,250; that he did not know where the $10,000.00 came from that reimbursed the Federal Parlor Furniture Company for the amount of its check; that the Federal Parlor Furniture Company has no interest in any of the corporations of the defendants.

It is the evidence of one Anderson, an accountant, that he, at the request of Meyer, audited the books of the Illinois Company; that when he was at the office of the Company in February, 1926, he saw either a duplicate voucher or a check for $10,000.00, drawn on the account of the Illinois Company at the Central Trust Company of Illinois; that he was never told by anyone what that check was drawn for. In the course of the trial, solicitors for Meyer, by appropriate notice to produce, requested of the defendants the production of the check of the Illinois Company for $10,000.00, which it was stated was given for the purpose of reimbursing Goldboss for his advancement upon the purchase of property for the Carolina Woods Products Company of Delaware. The solicitors for the defendants denied the existence of such a check. After the testimony of Anderson and one Johnson, the latter testifying that two checks of the Illinois Company, each for $10,000.00, were presented to the Central Trust Company and paid by the bank on Februaty 13, 1926, Lauterstein admitted that he signed the two checks for $10,000, which appeared in the account of the Illinois Company, as having been paid by the Central Trust

bank or purchasing, but a bankrupt was only or the Illinois Road Vehicle Company of Waukegan, in his city, with the American Trust Bank, to cover the check for $20,000, and the price paid by the Illinois Road Vehicle Company of Delaware for the property was $45,000; that he did not know why the $15,000 came from but relegated the Illinois Furniture Company for the amount of its check; that the Illinois Furniture Company has no interest in any of the corporations of the defendants.

In the ex evidence of the defendant, as recorded, that he, at the request of Dyer, audited the books of the Illinois Company; that when he was at the office of the Company in February, 1922, he saw either a duplicate voucher or a check for $20,000.00, drawn on the account of the Illinois Company at the Central Trust Company of Illinois; that he was never paid by anyone who that check was drawn for. In the course of the trial, witnesses for Dyer, by stipulation, gave to pictures, remarks of the Chicago the production of the check of the Illinois Company for $15,000.00, which it was shown was given for the purpose of reimbursing Dyer the 15 advanced with the purchase of securing the Illinois Road Vehicle Company of Delaware. The solicitors for the defendants treated the evidence of such a check. After the testimony of Anderson and the witness, the Dyer testifying that the check of the Illinois Company, dated for $20,000.00, was presented to the Central Trust Company and paid by the bank on February 15, 1922, investigation showed that no signature to the check for $15,000, which appeared in the account of the Illinois Company, as having been paid by the Central Trust

Company on February 13, 1926, but that he did not know their contents.

The record shows that although stated by counsel for Lauterstein and Isaacs that they would have the checks brought on from New York, and would bring in testimony to show what the checks were for, the checks were not produced, nor their non-production accounted for, and no further evidence given as to what they were for.

The decree of the Chancellor found that the complainant, Meyer, was and never ceased to be, a stockholder of the Illinois Company, and as such stockholder, was entitled to the rights belonging to one; that no accounting was ever made by Lauterstein and Isaacs, who practically owned and controlled the corporation, for profits made by them as the parties in control of the eastern corporations upon business billed in their names, and upon which they received profits which belonged to the Illinois Company; that the Illinois Company had ceased doing business and was no longer a going concern; that Lauterstein and Isaacs wrongfully regarded themselves as the sole owners of the Illinois Company and were using its assets for the benefit only of themselves and their eastern corporations; that the acts of the defendants constituted a breach of their duties as directors of the Illinois Company, with Meyer as a stockholder; that an accounting should be required of them, and pending such accounting, the Illinois Company should be placed in receivership. The decree provides for an accounting not only by the defendants to the complainant, as a stockholder, but, also, by the complainant to the defendants upon his unpaid stock subscription of

of $3,000.00, as well as upon an item of approximately $150.00, which arose subsequent to January 19, 1926.

It is contended on behalf of the defendants that the chancellor erred in taking jurisdiction of the issues precipitated by the pleadings. With that we cannot agree. Where a bill of complaint, through appropriate allegations, charges mismanagement and fraud on the part of the officers of the corporation, and those who are its principal stockholders, a court of equity will take jurisdiction. Where it is alleged that a wrong has been consummated, and appropriate facts are set up to show it, the complainant is entitled to ask for an accounting, and such other equitable relief as the facts of the case may warrant and justify. Chicago v. Cameron, 120 Ill. 447; Vorhees v. Mason, 245 Ill. 358; Merle v. Seifeld, 275 Ill. 594; 2 Cook on Corps., Part IV, Chap.38, 6th ed.; 10 Cyc. 967. In our judgment, the bill of complaint set forth sufficient facts to justify the court in taking jurisdiction.

It is contended on behalf of the defendants that the complainant never was a stockholder of the Illinois Company; that although the complainant subscribed for twenty-five shares of stock and paid for only nineteen of them, and because the certificate for twenty-five shares, while signed and properly executed, was never physically delivered to the complainant, no rights or obligations arose in him as a stockholder until the balance of $3,000.00 was paid. With that we cannot agree. That there was an understanding between the parties at the time, that the certificate of stock should be left with the corporation until the balance, $3,000.00, was paid, was no evidence whatever that the complainant, upon the

of $2,000.00, as well as upon an item of unpaid[illegible] $[illegible], which [illegible] subsequent to January 14, 1919.

It is contended on behalf of the defendants that the commission erred in taking jurisdiction of the issues prejudicated by the plaintiffs. Rule that as a court [illegible] have a full or equitable, [illegible] [illegible] allegations [illegible] and fraud on the part of the [illegible] of the [illegible], and [illegible] the [illegible] a court of equity will take jurisdiction. There is [illegible] that a [illegible] been [illegible], and [illegible] are [illegible] up to that [illegible] the complainant is entitled to [illegible] an accounting, and [illegible] relief as the [illegible] of the case may require and justify. Johnson v. [illegible], [illegible] Ill. 447; Vandike v. [illegible], 148 Ill. 467; [illegible] v. [illegible], [illegible] Ill. 384; 3 Dom. Eq. Juris. Sect. 1[illegible], Chap. 28, 5th ed.; 1[illegible] 447. In our judgment, the bill of complaint set forth sufficient [illegible] to justify the court in taking jurisdiction.

It is contended on behalf of the defendants that the original power [illegible] of the [illegible] [illegible] that although the complainant subscribed for twenty-five shares of stock and paid for only eighteen of them, and because the certificate for twenty-five shares, with signed and properly assigned, was never physically delivered to the complainant, no rights or obligations rested in him as a stockholder until the payment of $2,000.00 was made. With that we cannot agree. This being an [illegible] [illegible] parties at the time, that the certificate of stock should be left with the secretaries until the balance, $2,000.00, was paid, was an evidence [illegible] that the complainant, upon the

payment of $9,500.00 and the execution of the certificate of stock, was not a stockholder. He became a stockholder when he signed the subscription and paid his money, and the physical certificate of stock, although in the possession of the Company, was merely evidence of what, in part at least, the relations of the complainant were with the Company. Further, it could make no difference here whether he owned nineteen or twenty-five shares, as long as he was actually a stockholder. Gillette v. C. T. & T. Co., 330 Ill. 373, 413.

It is contended on behalf of the defendants that the court erred in finding that the complainant was a stockholder subsequent to January 19, 1936, and that he did not release and surrender his stock and cease to be a stockholder in said company by reason of the release of January 19, 1936. We do not find anything in the release of January 19, 1936, that even suggests that the complainant agreed to give up his interest as a stockholder in the corporation. It is true that the last words of the agreement of January 19, 1936, are, "Odd Meyer now releases the Caroline Wood Products Company of Illinois from any and all agreements whatsoever," but the complainant's ownership of his stock in the corporation was a vested property right, a definite right in him of a fractional interest in the corporation, so that when he released the Illinois Company "from any and all agreements whatsoever," obviously, that had no reference whatever to that which was not in the nature of an agreement, but an established vested property interest and ownership.

payment of $8,000.00 and the execution of the usual form of deed, was not a stockholder. He became a shareholder when he signed the subscription and paid his money, and the physical certificate of stock, although in the possession of the company, was merely evidence of ownership, or proof at least, the rights of the shareholder were vis: the company. Further, it would make no difference how similar he owned shares or twenty-five shares, so long as he was actually a stockholder. Gillis v. R. R. & T. Co., 65 Ill. 276, 283.

It is contended on behalf of the defendants that the court erred in finding that the complainant was a stockholder subsequent to January 16, 1906, and that he did not release and renounce his stock and cease to be a stockholder in said company by reason of the release of January 16, 1906. We do not find anything in the evidence of January 16, 1906, that even suggests that the complainant had agreed to give up his interest as a shareholder in the corporation. It is true that the last words of the agreement of January 16, 1906, are, "And hereby now release the Carolina Land Company of Illinois from any and all agreements whatsoever," but the complainant's ownership of his stock in the corporation was a vested property right, a definite right in his of a fractional interest in the corporation, so that when he released the Illinois company "from any and all agreements whatsoever," obviously, that had no reference whatever to that which was in the nature of an agreement, but to unfulfilled written property interests and ownership.

Counsel for the defendants in their brief state that "The crux of this litigation is, Did Odd Meyer by his release deed of January 19, 1926, release Carolina Wood Products Company of Illinois from its agreement to deliver twenty-five shares of stock to him in accordance with an agreement made at the time of the incorporation of the company, in July, 1925? If he did, he has no cause of action in this case. If he did not, and was a stockholder subsequent to January 19, 1926, he is entitled to his right as a stockholder". As we have stated above, it is our judgment that the alleged release in question did not relate to, or affect in any way his vested interest as a stockholder in the corporation.

It is contended for thedefendants that the court erred in finding that Lauterstein and Isaacs had been and were wrongfully diverting assets of the corporation, and erred in finding that $10,000.00 belonging to the Illinois Company, had been used by the defendants for the purpose of purchasing a Chicago warehouse for other and different corporations. Although we are of the opinion that there is evidence on both those subjects, yet in view of the position which counsel for the defendants have taken in regard to the release deed of January 19, 1926, which we hold did not take away from the complainant his rights as a stockholder, it is not necessary upon this review to discuss at large the allegations as to the diversion of assets and as to the alleged use of $10,000.00 belonging to the Illinois Company.

In our judgment, the record as it appears here, does not justify us in any way in overriding any of the findings

Counsel for the defendants in their brief state that "the cause of this litigation is, the one lawyer by his release dated of January 18, 1888, relieves Grolius Wood Production Company of Illinois from his agreement to deliver twenty-five shares of stock to him in accordance with an agreement made at the time of the incorporation of the company, in July, 1887." If so did, he has no cause of action in this case. If he did not, and was a stockholder subsequent to January 18, 1888, he is entitled to the right as a stockholder. As we have stated above, it is our judgment that the alleged release in question did not relate to, or affect in any way his status interest as a stockholder in the corporation.

It is contended for the defendants that the court erred in finding that Lutkewitsch and James Ban Ban and were wrongfully withholding assets of the corporation, and erred in finding that Eli,Joe,Ed belonging to the Illinois Company, but were sole to the defendants for the purpose of producing a single evidence for which and different corporation. Although on one of the points that there is evidence on both these contents, yet in view of the position which counsel for the defendants have taken in regard to the release dated of January 18, 1888, which we hold did not take away from the complainant his rights as a stockholder, it is not necessary upon this review to discuss at large the disagreements as to the division of assets and as to the alleged use of Eli,Joe,Ed belonging to the Illinois Company.

In our judgment, the record of it appears that does not justify us in any way in controlling any of the findings

of the chancellor. He was of the opinion that, from the evidence presented to him, the complainant was entitled to an accounting, and, also, to the appointment of a receiver. We find no sufficient reason for overriding his judgment. The decree, therefore, will be affirmed.

AFFIRMED.

HOLDOM AND WILSON, JJ. CONCUR.

146 - 31756

ACME INDUSTRIAL COMPANY, a corp., Appellant,	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
v.	
CHARLES S. ALYEA, Appellee.	

Opinion filed Dec. 31, 1927.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On February 18, 1925, the plaintiff, Acme Industrial Company, a corporation, began suit in the Superior Court against the defendant Charles S. Alyea for $2,226.08. The declaration contained the common counts, and a special count on an account stated. In the latter it is alleged that on January 1, 1925, the defendant owed the plaintiff $2,226.08 and promised to pay it. The defendant filed a plea of set-off, in which it claimed among other things, the sum of $3,850.00, for certain license fees due from the plaintiff under a written contract. To the defendant's setoff the plaintiff filed a replication, alleging that the written contract, above referred to, was made on February 16, 1923, but that thereafter, on January 1, 1924, it was cancelled and rescinded by a new agreement, the defendant agreeing at the time of the rescission and cancellation to pay the plaintiff the amount claimed in the declaration.

Opinion filed Dec. 31, 1927.

There was a trial before the trial court, without a jury, and a judgment in favor of the defendant on his set-off, in the sum of $1,823.92. This appeal is therefrom.

The evidence at the trial consists of the testimony of Fitzgerald, Adam and Steelhammer for the plaintiff; the testimony of the defendant, himself, and a written agreement dated February 16, 1923, made between the plaintiff and the defendant.

In the abstract, all the testimony covers four pages; but in the record it covers about 70 typewritten pages. An examination of the record shows great confusion, owing, apparently, to many seemingly, needless colloquies between court and counsel.

It was the theory of the plaintiff, as far as it can be discovered, that it was the duty of the defendant, as an agent of the plaintiff, to sell and distribute a pump and water system of the plaintiff and to get other agents to do the same; that the plaintiff furnished the pumps and water systems; that the defendant owed the plaintiff for merchandise, that is, pumps and water systems, which were bought outright by the defendant; that the account of the defendant on the books of the plaintiff, showed that he owed the plaintiff, on September 1, 1924, $7,319.00; that early in 1924, the plaintiff and the defendant cancelled the contract of February 16, 1923, and in the early part of 1924; made a new contract, which they worked under; that about September, 1924, the account was discussed with the defendant and he said he could not pay it then as he could

not "seem to get any money in;" that the acts of the defendant amounted to a recognition of the account.

The theory of the defendant is that as the written contract of February 16, 1933, provided that during the life of the contract the plaintiff would pay to the defendant ten per cent of the selling price as a license fee for the manufacture and sale of each water pump, and as the plaintiff agreed to manufacture and sell, at its own expense, a minimum of 200 pumps in 1933, and 350 pumps in 1934, and as the minimum selling price of the pump was $70.00, he, the defendant, was entitled to seven dollars each on 550 pumps, for the first and second years, making a total of $3850.00, and, as the plaintiff's claim amounts to $2,326.08, the difference between that amount and $3850.00 is $1523.92, the amount of the judgment, it should stand.

We are constrained to conclude, from an examination of the record that it is a question whether either the account stated or the set-off of the defendant, which was based solely on the alleged contract in question, was proved. Apparently there is no evidence whatever introduced on behalf of the defendant in regard to the contract of February 16, 1933, save the testimony of the defendant that the contract in question was signed by himself and the plaintiff. On the other hand, there is evidence for the plaintiff that that contract was abrogated and a new one made in its stead in the early part of 1934, and that pursuant to the new contract, which was an oral one, they worked and did business together, and so to that extent bound themselves.

The trial judge, in the latter part of the trial when the evidence was in an obvious state of confusion in regard to the claims by each side, stated that "this lawsuit is not being tried as it ought to be tried on both sides. This is not prepared. That is the reason the court has got to ask so many questions, I don't want to interfere with the lawsuit." The record, undoubtedly shows that the case was not tried in an orderly way, and that there was too much interruption in the course of the examination of the witnesses, and too many disturbing and useless discussions between court and counsel; the result of which is that, now, as the record appears here before us, we are constrained to conclude that the judgment must be reversed and that there should be a new trial in order that the claim of the plaintiff and the set-off of the defendant may be properly adjudicated. The judgment, therefore, will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

HOLDOM AND WILSON, JJ., CONCUR.

155 - 31766

CELIA WALDER, Appellant, v. ALVIN COHEN, Appellee.	ERROR TO MUNICIPAL COURT OF CHICAGO.

Opinion filed Dec. 21, 1927.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On December 13, 1926, Celia Walder, the plaintiff, obtained a judgment by confession, in the Municipal Court, in the sum of $66.38 on a promissory note with a warrant of attorney attached.

On December 27, 1926, on motion and affidavit of the defendant, the court opened up the judgment and gave leave to the defendant to make a defense, and ordered that meanwhile the judgment stand as security, and that execution be stayed until the further order of the court.

The petition alleged, among other things, that on June 21, 1926, the defendant duly signed the promissory note in question in the sum of $50.00, payable thirty days after date; that the note was turned over to one M. N. Andalman, who was at that time the attorney for a certain organization known as the Chicago Junk Dealers' Protective Association; that it was given to the attorney for legal services to be rendered to the defendant; that thirty days after the note was executed, the defendant paid to the said attorney by check the full amount of the note; that the note was never

returned to the defendant, though often demanded; that on December 20, 1926, he, the defendant, was served with a writ of execution, based upon the judgment; that that was the first time he was made aware that the note had been transferred; that at no time was demand made upon him by the plaintiff for the payment of the note; that the plaintiff obtained the note long after its maturity, and did not pay any valuable consideration therefor. In the petition the defendant denied that the plaintiff was bona fide holder for value of said note.

On February 14, 1927, there was a trial before the court, without a jury, and the court found the issues against the plaintiff and ordered that the judgment by confession of December 13, 1926, for $66.36, be vacated and set aside; and entered judgment that the plaintiff take nothing by his suit, and that the defendant have and recover of and from the plaintiff the costs by him expended. This appeal is from the above mentioned judgment of February 14, 1927.

No briefs have been filed on behalf of the defendant.

The evidence shows that the note was for $50.00; was dated June 21, 1926, payable thirty days after date, to the order of the Chicago Junk Dealers' Protective Assn., signed by Alvin Cohen, and endorsed by the Chicago Junk Dealers' Protective Assn. and M. N. Andelman; that the defendant was a member of the Association; that Andelman was attorney for the Association, and at a meeting of the Association, was employed by it to take care of a certain litigation,

and to receive for his services $10,000.00; that each member of the Association was to pay $135.00; that the note in question was given by the defendant as part payment of the charge of $135.00 against him; that subsequently, on July 26, the defendant sent by mail to the plaintiff a check for $50.00; that the plaintiff received the check and credited it on the defendant's account, leaving a balance due of $75.00; that the note, when it was originally given by the defendant, was endorsed by the secretary of the Association, and turned over to the plaintiff; that the plaintiff received the check without any directions, on the part of the defendant, whether to apply it to the note or upon the open account; that Andalman applied it on the $75.00 open account; that he assigned the note to the plaintiff because he did not wish to bring suit in his own name.

The chief question in the case is whether Andalman had the right to credit the amount of the check on the open account; or whether it should be considered as payment for the $50.00 note, upon which the judgment herein was confessed. The trial judge held that it was the duty of Andalman to credit the check upon the note, rather than upon the open account.

It will be seen from the evidence that at the time the defendant sent the $50.00 check to Andalman, the defendant owed the plaintiff a total of $135.00, part of which, however, was evidenced by the $50.00 note; that is, there was but one debt, and that was for the sum of $135.00. There being but one debt and the defendant having sent, voluntarily, without instructions, the check in question to

Andalman, and there being no evidence of any intention on the part of the defendant that he desired it applied to the debt evidenced by the note, it would seem, under the law, that Andalman was entitled, if he saw fit, to so credit $50.00 on account of the defendant's indebtedness so as to leave $75.00 unpaid, and retain the note as evidence of part of the remaining debt of $75.00. It has been held that where a payment, without any specific direction as to its application, is received by a creditor, he is entitled to apply such payment to any part of the debtor's obligations; that he may apply it on an old debt rather than on a new one, or vice versa; that he may apply it on an item of indebtedness which is not the same in amount as the amount paid, even though there be some other item of the account which is equal to the amount paid; and that he may apply it on an unsecured rather than a secured claim, or on a claim which is not secured by a lien, instead of on one which is. Wellman v. Minor, 179 Ill. 328; Adams Express Co. v. Black, et al, 63 Ind. 128; Brentlinger v. Goldthait, et al 73 Ind. 481; Davis Sewing Machine Co. v. Buckles, 82 Ill. 337; Subeik v. Trustees of Schools, 24 Ill. App. 382; Koch, et al v. Roth, 150 Ill. 313; Plain v. Roth, et al, 107 Ill. 326; Harding v. Harding, 130 Ill. App. 390; Brinckerhoff, et al v. Gregman, 85 Ill. App. 353; 30 Cyc. 1322.

The judgment, therefore, will be reversed, and judgment entered here for the plaintiff against the defendant in the sum of $66.38 and costs.

REVERSED AND JUDGMENT HERE.

HOLDOM AND WILSON, JJ. CONCUR.

A02-31313

SAMUEL DONIAN, APPELLEE, vs. MARDROS GORGORIAN, APPELLANT.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Dec. 31, 1927.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

The issue in this case was precipitated by an amended statement of claim and an amended affidavit of merits. In the amended statement of claim, the plaintiff alleged that the defendant was indebted to him in the sum of $1,075.00, with interest from September 8, 1923; that on or about March 20, 1923, the plaintiff was a stockholder in the Arax Oil Company; that the defendant was also a stockholder and officer of said Company; that the plaintiff, in order to assist the Arax Oil Company to raise money, gave his note, dated May 9, 1922, for the sum of $1,000.00, due ninety days after date, payable to the order of one Keljik, secretary of the Arax Oil Company; that Keljik negotiated the note, and the Arax Oil Company received the sum of $1,000.00 thereon, all of which was known to the defendant; that thereby he, the plaintiff, became indebted to Keljik, or the legal owner and holder of the note, in the sum of $1,000.00; that on or about March 30, 1923, the defendant requested the plaintiff to loan to the Arax Oil Company $7,500.00

Opinion filed Dec. 21, 1927.

to aid it in its operations; that the plaintiff thereupon promised and agreed to make a loan of $7500.00 to the Arax Oil Company, upon the express condition, however, that the defendant would assume and pay the obligation of the plaintiff on the note for $1,000.00; that relying upon the promise of the defendant, the plaintiff did loan and furnish to the Arax Oil Company $7500.00; but that the defendant has failed and refused to pay the note for $1,000.00 of the plaintiff; that by reason thereof, the plaintiff was forced to and did, on September 2, 1923, discharge his obligation on the note for $1,000.00, by paying the sum of $1,075.00, being principal and interest; that he has made repeated demands upon the defendant for payment of the $1,075.00, with interest from September 2, 1923, but that the defendant has refused to pay said sum.

The defendant, in his amended affidavit of merits, denies that he is indebted to the plaintiff in the sum of $1,075.00, or any other amount whatsoever; admits that he was a stockholder in the Arax Oil Company, together with the plaintiff and others on March 20, 1923; but denies that he was an officer. He states, further, that he neither admits nor denies that the plaintiff executed a note for $1,000.00, payable to Keljik; and neither admits nor denies that the note for $1,00 .00 was negotiated by Keljik, Secretary of the Arax Oil Company, or that the sum of $1,000.00 was received by the Arax Oil Company. He further denies that the plaintiff owed or was indebted to Keljik, or the legal holder of the note, in the sum of

to -11 is in its ownership; that the plaintiff thereupon
promised and agreed to make a loan of $7000.00 to the
said oil company, upon the express condition, however,
that the defendant would assume and pay the outstanding
of the plaintiff on the note for $1,000.00; that relying
upon the promise of the defendant, the plaintiff did loan
and furnish to the said oil company $7000.00; and that the
defendant has failed and refused to pay the same for
$1,000.00 of the plaintiff; that by reason thereof, the
plaintiff was forced to sue and did, on September 5, 1928,
discharge his obligation on the note for $1,000.00, by
paying the sum of $1,070.00, being principal and interest;
that he has made repeated demands upon the defendant for
payment of the $1,070.00, with interest from September
5, 1928, but that the defendant has refused to pay said
sum.

The defendant, in his amended pleadings as setting
forth, that he is indebted to the plaintiff in the sum
of $1,070.00, or any other amount whatsoever; admits that he
was a shareholder in the oil company, together with
the plaintiff and others in March 20, 1928; but denies
that he was an officer. He admits, however, that he
neither knew nor claims that the plaintiff executed a
note for $1,000.00, payable to Kelly; and neither admits
nor denies that the note for $1,000.00 was endorsed by
Kelly, secretary of the Sun Oil Company, or that the sum
of $1,000.00 was received by the Sun Oil Company. He further
denies that the plaintiff dealt or was indebted to
Kelly, or the legal holder of the note, in the sum of

$1,000.00; denies that he desired and requested the plaintiff to loan to the Arax Oil Company the sum of $7500.00, or any amount whatsoever; denies that he promised and agreed that he would pay said note for $1,000.00. He further states that there was no consideration for the alleged promise, and if made, was within the statute of frauds, and not being in writing, was not binding; that by the misrepresentations of the plaintiff, he was induced to invest $6,000.00 in the Arax Oil Company, which is now a total loss.

There was a trial before the court, without a jury, and on October 9, 1926, judgment was entered in favor of the plaintiff and against the defendant in the sum of $1,000.00. This appeal is from that judgment.

The evidence of the plaintiff consists of the testimony of the plaintiff and that of two witnesses, Nestjian and Pushman, together with an examination of the defendant under Section 33, and certain exhibits.

Two questions arise in the case, first, is the finding of the trial judge that the defendant promised to pay the $1,000.00 note against the manifest weight of the evidence; and second, if not, was the promise, being to pay the debt of another, in violation of the statute of frauds, and therefore not binding upon the defendant?

As to the question of fact. We have carefully examined the evidence, and have been compelled to reach the conclusion that we would not be justified in holding that the determination of the trial judge that the

defendant promised to pay the note in question was against the manifest weight of the evidence.

From the testimony of the plaintiff and the defendant, and Mestjian and Pushman, it appears that they were all interested in the Arax Oil Company, and that in the spring of 1923, there was a meeting of the four, the purpose of which was to raise money to go on further with the work of the Oil Company. The evidence of Mestjian is that at that meeting, about March 9, 1923, at the office of Pushman, all four were present; that, having just returned from Texas with a report, he told them if they could finance another well by raising a certain sum they would succeed; that the plaintiff and Pushman were asked for $7500.00 a piece; that the plaintiff said, "I don't care who pays. If you will be responsible for that thousand dollar note, I will put up $7500.00. If you can get $500.00 from Northabitian, go ahead and get it. I have no objection to that, but I must have somebody responsible. If you will be responsible, I will put up that money. 'The way I understand, Mr. Gorgorian accepted to be responsible for that thousand dollars'"; that the defendant said "he would pay, he would take care of it;" that "Mr. Gorgorian agreed to take care of that note;" that on that condition the plaintiff put in $7500.00.

The evidence of Pushman, who was president of the Arax Oil Company, corroborated the testimony of Mestjian, who was, also, one of the stockholders, and one of the directors of the Company. His testimony is that at the meeting in question he tried to raise money for another well for the Arax Oil Company of Texas, and that

they needed about $17,500.00; that there was a proposition to the effect that he and the plaintiff should put up $7500.00 a piece, and another man in New York, $2500.00, and that it should be a loan to the Company with which it might dig a new well; that the plaintiff raised the question as to a note which was outstanding, which he had signed and given to Keljik, the Treasurer of the Company; that the plaintiff said, "If somebody else will take care of the thousand dollar note, I will pay the $7500.00;" that they appealed to the defendant to take care of it; that there was further discussion in regard to the matter, and finally the defendant said, "he would pay; he would take care of it;" "the defendant agreed to take care of that note;" that he used the words, "I will accept."

The evidence of the plaintiff is to the effect that at the meeting in question, he told Fushman he was going to put up another $7500.00 in the business, provided the $1,000.00 note was taken care of. Although the evidence of the plaintiff is somewhat confusing, arising apparently, somewhat, from his not speaking English well, there is no doubt that it is his evidence that it was his understanding, from the words spoken at the meeting in question, that the defendant promised to pay the $1,000.00

The defendant denied, categorically, that he ever made any such promise. His testimony is to the effect that at about the time the meeting was over, and after the plaintiff and Fushman had agreed to put in $7500.00 a piece, the plaintiff said that if he put in that much money the three of them ought to take care of the thousand dollar note, referring to Mestjian, one Korthabitian and himself; that he, the defendant, said, "If them people have no objections and they

long needed them $12,000.00. Yet there was a precedition
to the effect that we and the plaintiff should use an
[illegible] [illegible] on the term $[illegible].00,
and that it would be a loss to the company with which it might
do a new [illegible]. Yet the [illegible] raised the question as to
a note which was [illegible], which on its [illegible] and where it
[illegible], the [illegible] of the company, that the plaintiff will
"If was only also will [illegible] of the [illegible] [illegible]
more, I will pay the $[illegible].00." Then they appealed to the
[illegible] to view of it. [illegible] [illegible] [illegible]
in regard to the matter, and finally the defendant said,
"he would pay; he would take care of it." The defendant
agreed to [illegible] on their [illegible]. Then he used the words,
"I will [illegible]."

The evidence of the plaintiff is to the effect that
at the meeting in question, he told Freeman he was going to
put up another $[illegible].00 to the Freeman, provided the $[illegible].00
[illegible] and [illegible] [illegible]. Although the evidence of the plaintiff
is somewhat conflicting, or rather inconsistent, somewhat, from his
not [illegible] [illegible] well, there is no doubt that it is his
evidence that it was his instructions, from the [illegible] [illegible] at
the meeting in question, that the defendant promised to pay
the $[illegible].00.

The defendant denied, categorically, that he ever made
any such promise. His testimony is to the effect that at about
the time the meeting was over, and after the plaintiff had
[illegible] and agreed to put in $[illegible].00 a piece, the plaintiff
said that it is not so [illegible] that the [illegible] at [illegible] ought
to take care of the thousand dollar note, referring to
[illegible], and [illegible] [illegible] [illegible]; that the
[illegible], with, if [illegible] [illegible] [illegible] and that

will pay their share, I will pay this thousand dollars;" that Mestjian, who was expecting to go to Texas in regard to the Oil Company, said he would work down there for three months without any compensation, and as a result he ought not to be held for any part of the thousand dollars. The defendant further testified that he said if Sorthabitian signed for half the note, and Mestjian worked for the Company three months without salary, he was willing "to do the same thing," but, as a matter of fact, Mestjian went to Texas and came back in a week, and Sorthabitian refused to agree to it.

It will be seen that the chief matter involved was one of credibility; and on that subject, we are bound to bear in mind, here, the important circumstance that the trial judge saw and heard all four of the witnesses. Of course, that gave to him an advantage in determining the credit to be given to the testimony of each. Langden v. Hughes, 113 Ill. App. 202. If he believed from what he saw and heard that the plaintiff and his witnesses were telling the truth, it certainly would not be reasonable for us, considering only what the record here shows, to hold that the finding of the trial judge was manifestly against the weight of the evidence. The testimony of Mestjian and Pushman is very emphatic, and if believed, as well as that of the plaintiff, certainly overcame the testimony of the defendant.

As to the question of law. It is contended that the promise of the defendant was within the statute of frauds, which requires the promise to pay the debt of another to be in writing. In Borchsenius v. Samuelson, 100 Ill.82, the

[illegible] our their place. I will say this about the delivery: [illegible] [illegible] to be taken to [illegible] to the Oil company, will be held and done when the [illegible] advised our connection, and as a result he could not be held for my part in the unusual delivery. The defendant further contended that he said it [illegible] signal for all the men, and testimony showed for the company that [illegible] signal, he was calling "to do the same thing," but, in a matter of fact, Hartigan went to Texas and came back in a week, and Lottenbillion returned to Texas in 3[illegible].

It will be seen that the chief matter involved was one of credibility; and on that subject, as one bound to have in mind, here, the important circumstance that the trial judge saw and heard all that of the witnesses. Of course, that gives to him an advantage in determining the credit to be given to the testimony of each. London v. [illegible], 112 Ill. App. 300. If he believed from what he saw and heard and the plaintiff and his witnesses were telling the truth, it certainly would not be necessarily for us, considering only what the record here shows, to hold that the finding of the trial judge was manifestly against the weight of the evidence. The testimony of Hartigan and Toulmon is very convincing, and if believed, as will be that of the plaintiff, certainly warrants the finding of the defendant.

As to the question of law. It is contended that the [illegible] of the defendant was entire [illegible] [illegible] upon requires the [illegible] to [illegible] the fact of [illegible] or [illegible] in waiting. In Brownmann v. [illegible], 100 Ill.App. 1[illegible], the

court said,

> "In Clifford v. Luhring, 69 Ill. 401, it was recognized to be the doctrine that where the leading object of the undertaking is to promote some interest of the party's own, his promise to pay is not within the Statute of Frauds, although its effect is to release or suspend the debt of another."

Generally speaking, if the chief object of the promisor is to subserve some particular purpose of his own, and is not merely to answer for another, the promise, although in the form of a promise to pay the debt of another, is not within the statute of frauds. Tremayne v. McCarkey Register Co., 181 Ill. App. 398; Wilson v. Stevens, 58 Ill. 232; Meyer v. Hartman, 72 Ill. 442.

Considering the evidence in the case, the only reasonable conclusion as to the source of the promise of the defendant is, first, some expectant benefit from further investment by the company in the development of its business - and that would make the promise one of probable pecuniary benefit to himself, and was evidence of an intention to become a principal debtor, and primarily liable - and, second, to persuade the plaintiff to put up a certain sum of money, which the plaintiff did. There was, therefore, as a consequence of his promise, benefit to himself, the defendant, and, also, detriment to the plaintiff, and that made his promise an original undertaking, and, so, immune to the statute of frauds.

Being of the opinion, therefore, that we are not justified in overriding the determination of the trial judge to the effect that the defendant promised to pay the indebtedness, and, also, that the promise was not within the statute of frauds, the judgment will be affirmed.

AFFIRMED.

HOLDOM AND WILSON, JJ. CONCUR.

court said,

> The contract is, undoubtedly, void in law, in that it was occasioned by the fraudulent intent of the plaintiff leading object of the conspiracy is to compel some interest of the wife's own; the wording is such as just claims the rights of trade, although the claim is to injure or impoverish the part of another.[1]

Essentially something, it has been said, exists in the creation of an enforceable case particular purpose of his own, and is not merely to secure the property, the income, although in the form of a promise to pay the debt of another, it has within the purpose of income. Jennings v. Tallman, Barnes v. Hyde, 188 U.S. 458, 23 S.Ct. 389; Tilton v. Lawrence, 58 Ill. App. 1; Bailey v. Mathews, 30 Ill. App. 640.

Considering the evidence in the case, the only reasonable conclusion as to the nature of the promise of the defendant is, first, more speculative benefit from further investment by the company in the development of its business - but that would only the promise was a possible pecuniary benefit to himself, and not evidence of an intention to become a creditor, and primarily liable - and, secondly, to induce the plaintiff to use up a portion of money, which the plaintiff did. There was, therefore, no promise or promise of the creditor, benefit to himself, the defendant, and, also, intended to the plaintiff, and that was all insofar as material contracts, and, hence to the action of trover.

Using of the reasoning, therefore, that we are not justified in affirming the determination of the trial judge to the effect that the evidence presented by the plaintiffs, and, also, that the promise was not within the scheme of trover, the judgment will be affirmed.

AFFIRMED.

MCCOMB, J. (C. concur.)

240 I.A. 614

270 - 31881

JOHN ROGLAWSKI, Appellee,	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	)	
JOSEPH GOSZCZYNSKI, Appellant.	)	

Opinion filed Dec. 21, 1927.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On June 5, 1924, the plaintiff, John Roclawski, brought suit in the Municipal Court against the defendant, Joseph Goszczynski, for damages which, it was claimed, were the result of the negligence of the defendant in driving his automobile, on April 19, 1924, into one belonging to the plaintiff. Plaintiff's statement of claim alleged that while an automobile owned by him was lawfully standing in front of 717 North Ashland Avenue, Chicago, on April 19, 1924, the defendant, driving his automobile in a reckless and careless manner ran into and struck the plaintiff's automobile, damaging it to the extent of $999.99. The defendant, in his affidavit of merits, denied negligence and the damage. The cause was tried before the court, without a jury, and a judgment entered for the plaintiff and against the defendant in the sum of $540.35. This appeal is from that judgment.

Counsel for the defendant does not complain here against the finding of the trial judge that the defendant was guilty of negligence, but does complain here against

Opinion filed Dec. 21, 1927.

Mr. Justice Cardozo delivered the opinion of the court.

On June 2, 1924, the plaintiff, John Mahoney, brought suit in the municipal court against the defendant, Joseph Lamontagne, for damages which, it was claimed, were the result of the negligence of the defendant in driving his automobile, on April 19, 1924, upon and violently in the plaintiff. Plaintiff's statement of claim alleged that while he was assembled upon by the use lawfully crossing in front of the north bound street car, defendant, on April 19, 1924, the defendant, driving his automobile in a reckless and careless manner for into and across the plaintiff's automobile, damaging it to the extent of $300.00. The defendant, in his affidavit of merits, denied negligence and his answer. The issue was raised before the court, without a jury, and a judgment entered for the plaintiff and against the defendant in the sum of $800.00. This appeal is from that judgment.

Claimed for the defendant that the evidence fail against the finding of the trial judge that the defendant was guilty of negligence, and that the evidence bar against

the amount of damages awarded by the court on behalf of the plaintiff, the sum of $540.35."

The evidence of the plaintiff is that his car was damaged; that the leftside of the car was smashed up most; that the spring was all broken to pieces, bent up; that the tire carrier was all smashed up; that the frame was bent, the tank bent so that gasoline was leaking; that the shock absorbers were knocked off; that it was a Haynes car, which he bought second-hand; that it was almost like new when he bought it; that he bought it in 1922, about two years before the accident; that it was a 1919 model; that he paid $750.00 for it; that before the accident its condition was very good; that it was in good running condition all the time; that he used it in his real estate business practically every day; that it was in good condition every time he wanted to use it; that it was a seven passenger touring car, weighing about two tons.

Leonard, a witness for the plaintiff, who saw the accident, testified that the chassis of the plaintiff's car, after it was struck, was all out of line.

The evidence of the witness Marosek, for the plaintiff, is that he made the repairs on the plaintiff's car, straightened the frame, and in doing so, had to take off the body; that the motor arms were broken; that he told the plaintiff the motor was cracked, and the plaintiff told him to fix it up; that he took the motor apart and bought a new motor case, which is called a crank case; that the motor case cost over $300.00; that he straightened the frame, put in a new

gas tank, new shock absorbers, and some gaskets and a fender; that he spent 98 hours of work on the car, and charged $1.50 an hour, which was a fair and reasonable charge; that he had been a mechanic for fifteen years; that the price he got, $540.25, was a fair and reasonable charge for the repairs he made; that that was the amount of the bill which he rendered.

The bill rendered to the plaintiff by the witness, and which was paid by the plaintiff, is as follows:

"1	Crank case	$335.00
1	Gas tank	18.00
1	Jackson shock absorbers	15.00
1	Renew left fender	14.00
	Straightening frame	18.00
	Gaskets	1.25
2	Qts. motor oil	2.00
98	Hrs. of labor @ 1.50 hr.	147.00"

The evidence of the defendant is that he saw that the shock absorbers and the gas tank were damaged; that he did not see any fenders broken; that it was an old car; that the plaintiff said his car was a 1918 model.

The evidence of one Patterson, is that he was President of the Ajax Auto Company, and had been in the automobile business since 1907, buying and selling automobiles and repairing them but had never seen the car in question. In answer to a hypothetical question put to him as to the fair market value of such a 1919 second-hand automobile which had run 5,000 miles, he said that it would have a value of $175.00, and that if it was a 1918 model, it would have a value of $150.00. On cross-examination he testified that Haynes cars are not being built at the present time; that the new 1924's were being sold for $1,000.00; that their list price was $1500.00; that they were selling for about

gin fizz, her mint julep, and some gumbo and a trophy that he spent 20 hours of work on the car, and charged $2,00 an hour, which was a fair and reasonable charge; that he had been a member for fifteen years; that the price he got, $800.00, was a fair and reasonable price for the repairs he made; that the amount of the bill claim is reasonable.

The bill mentioned in the plaintiff's by the witness, and which was paid by the plaintiff, is as follows:

4 quart oil	2.00
1 new tire	12.00
1 Arrowsmith ignition	16.00
1 Jones lock frame	16.00
assembling frame	12.00
lacquer	5.00
1 qts. water oil	3.00
20 gns. of lacquer @ $2.00	140.00

The evidence of the defendant is that he saw that the about advertising the car you that were damaged; that he did not see any fracture damage; that it was an old car; that the plaintiff said the car was a 1919 model.

The defense of res judicata, is that in the Provincial of the Lynn Duke Company, and had been in the automobile business since 1907, buying and selling automobiles and repairing them; that he had never seen the car in question. In answer to a hypothetical question put to him as to the fair market value of such a 1919 seven-seat automobile with had you 4,000 miles, he said that it would have a value of $175.00, and that if it was a 1921 model, it would have a value of $180.00. In cross-examination he testified that Arrows cars are not being sold at the present time; that the car 1921's were worth not far $1,000.00; that there did take place for $500.00; that they were selling for about

$1,750.00 in 1918; that such a car depreciates probably 40 per cent the first year; probably 20 per cent the next year, and 15 per cent the next year.

It is contended for the defendant that the measure of damages for injuries to personal property which is not entirely destroyed, is the amount required to restore it to its previous condition, or the reasonable cost of repair; but that the amount awarded must be less than the value of the property before it was injured; and that as the testimony of Patterson was to the effect that the automobile before the collision was of a value of only $175.00, the trial judge erroneously awarded the plaintiff $355.75 more than the car was worth. It will be observed, however, it is the evidence of the plaintiff, that he purchased the car, a 1919 model, for $750.00, two years before the date of the accident and that then it was almost like new; that at the time of the accident it was in good condition; that before he bought it, it had been run 2,000 miles, as registered by the speedometer, and that he had run it about 3,000 miles after he bought it. That evidence, it is our judgment, tends to show that the car may very well have been worth much more than the amount testified to by Patterson, who never saw the car, but merely testified in answer to a hypothetical question. There is no doubt but that the repairs were made which were testified to by Marosek, who made them, and that they were fairly and reasonably worth $540.85; and that being admitted, and considering the evidence as to the cost of the car and its good condition at the time of the collision, in our opinion, it does not follow that the trial judge erred in holding that the plain-

tiff was entitled to recover $540.35 as damages and that that sum was less than the value of the car at the time of the collision. The trial judge, evidently, believed the testimony of the plaintiff as to the condition and cost of the car, and that, accordingly, the plaintiff was entitled to a judgment for the amount he had to spend to have it repaired.

We do not think the cases cited by the defendant are in point, for in the instant case there is evidence tending to prove that the car at the time of the collision was worth more than the cost of repairing. Berry, Automobiles, 5th Ed. p. 826.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

HOLDOM AND WILSON, JJ. CONCUR.

158 - 31769

247 I.A. 614

PECK & HILLS FURNITURE COMPANY, a corporation, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
HARRY BRESN, Appellant.	

Opinion filed Dec. 21, 1927.

MR. JUSTICE HOLDOM delivered the opinion of the court.

In a trial before the court by the agreement of the parties, there was a finding and judgment against defendant for $488.54, and he brings the record to this court seeking a reversal of that judgment.

The controversy concerns a question of fact. It is conceded that defendant in propria personae bought of the plaintiff a Chinese rug for the price of $475 on April 2, 1926. Plaintiff contends that defendant bought the rug for himself personally to present to his wife as a gift and defendant insists that as manager and buyer of the General Wood Turning Company he bought the rug for the company, not for himself personally.

The question for the court is the probative force of the believable evidence. The proofs are extremely contradictory. In this situation it was for the court to decide, from all the facts in proof, as to which of the parties sustained their contentions by their proofs. In

Opinion filed Dec. 21, 1927.

other words, to which version of the controversy did the trial judge, from the proofs before him, give the greatest credit. The same credence is to be given to the findings of fact, by the trial judge, as to the solution of such facts by the verdict of a jury. The trial judge saw the witnesses and heard their testimony and observed their appearance and manner of testifying, privileges denied this court, and therefrom was better able than are we to decide as to which state of facts are most convincing to the judicial mind and entitled to the greater credit.

It appears that defendant's company had a credit account with plaintiff, and that the account was, as agreed at the time of the purchase, rendered to that company, but the defendant's name was put upon the account thus, "marked for Brasn". The manager of the plaintiff, who made the sale to defendant, testified inter alia that the defendant bought the rug as a present for his wife, and at first requested the rug to be sent to his residence, but when he was told to do so would cost three dollars extra, he requested that it be sent to the General Wood Turning Company's place of business; that two weeks thereafter he called him up and said the rug was at his home and that the nap was coming out of the rug and that his wife was beginning to worry about it. He replied that there was nothing wrong with the rug and that to go ahead and use it; that he heard no further complaints. Another salesman of plaintiff, who took part in making the sale of the rug to defendant, corroborated the material part of the preceding witness' testimony.

other words, in with wonders of the contraverey did the trial judge, from his ivory tower below, give the greatest credit. The same question is to be given to the finding of fact, by the trial judge, as to the relation of such facts by the verdict of a jury. The trial judge saw the witnesses and heard their testimony and observed their demeanor and hence is qualified, providing social conditions and events of credibility, identifying social bias counsel, and therefore can better make them say to be so with which is from one court contrasting to the judicial mind are confined to the greater credit.

It appears that defendant's company had a credit account with plaintiff, and that the account was, as appears at the time of the overtaken, indebted to that company, but the defendant's home was not upon the ground that, "money for breed". The property of the plaintiff, was in the main to defendant, whilst [illegible] did not the defendant bought the rug as a present for his wife, and at first represented the rug to be made to his mustaches, but when he was told to do so would make there million extra, he mentioned that it he was at his home and that his wife was coming out of the rug and that his wife was judgmental in verry about it. He realized that there was nothing wrong with the rug and that to go about and not at; that he based on further consultation another mistress of defendant, who took part in making the sale of the rug to defendant, approximated the material part of the preceding witness' testimony.

Defendant admitted buying the rug, but denies that he bought it personally or said that he wanted the rug to give his wife as a present, but that he told the person from whom he bought the rug that he was representing the General Wood Turning Company, for whom he wanted it. He further swore that his customer was a Mrs. Applebaum, who lived at "about" 6300 Lakewood Avenue, Chicago; that he charged the rug to his customer on the books of his company; that the bill for the rug was received in April, and that in July there was a fire which destroyed his Company's books; that on October 27th thereafter his Company was put into bankruptcy; that he never personally promised to pay for the rug. He further testified that Mrs. Applebaum paid the purchase price of the rug to his Company upon its delivery to her. Abraham, the son of defendant, testifying for defendant, in many substantial particulars corroborated his father's testimony, as he swore that he was present when his father purchased the rug of plaintiff. On cross-examination the son testified that Mrs. Applebaum, to whom his father swore he sold the rug for his Company, was his aunt, the sister of his mother.

We think the trial judge might reasonably find from the weight of the proofs that defendant bought the rug on his own account and not for the account of his Company. There are many suspicious circumstances arising from defendant's proofs. Why did he take his son with him to plaintiff's place of business when he bought the rug? One might conclude it was to make evidence to escape payment for the rug. The son, from all that appears from the record, was of no service in making the purchase, he served no legitimately useful pur-

Galenbone admitted buying the rug, but insisted that he bought it personally or said that he wanted the rug to give his wife as a present, but that he told the person from whom he bought the rug that he was representing the General Wool Training Company, for whom he wanted it. To further establish that Galenbone was a mere Adolphus, who lived of "about" 6000 Lakewood Avenue, Chicago, that he charged the rug to his customer on the books of his company, that the bill for the rug was received in April, and that in July there was a file with Galenbone's company's broker, that on October 27th thereafter his company was put into bankruptcy, that he never personally intended to pay for the rug. He further testified that Mrs. Galenbone paid the purchase price of the rug to his company upon its delivery to her. Jordan, the son of Galenbone, testifying for Mitchell, in his cross-examination positively acknowledged his father's testimony, as he knew that he was present when the father presented the rug of Mitchell. By cross-examination the son testified that Mrs. Galenbone, to whom his father meant to sell the rug for his company, was his aunt, the sister of his mother.

In fact, the total judge might reasonably find from the weight of the proofs that defendant bought the rug on his own account and not for the account of his company. There are many suspicious circumstances relating from defendant's proofs. May not he take his own with his plaintiff's place of business when he bought the rug? One might conclude it was to pile evidence to escape payment for the rug. The son, from all that appears from the record, was of no service in making the purchase, he proved no logistically useful purpose

pose by his presence. Then the rug was sold to Mrs. Applebaum, his sister-in-law, who paid for it on delivery. From which circumstance the trial judge might naturally conclude, as he sold it without a profit, that the transaction, both of purchase and sale, was personal to himself. Another suspicious circumstance is the alleged fire which destroyed the account books of the General Wood Turning Company, which books, if properly kept, might have furnished proof of the transaction by entries thereof, or the failure of any entries regarding the same, then the collection of the exact purchase price from Mrs. Applebaum followed by the bankruptcy of the Wood Turning Company. For our part we join the trial judge in giving greater credence and weight to the proofs of plaintiff than we accord to that of defendant.

Baird v. Hooker, 5 Ill. App. 306, is analogous to the instant case, in which the court inter alia said:

> "As to whether said contract was made, the evidence is conflicting, the testimony of Hooker and Baird being directly contradictory. Counsel for defendant urges upon our attention certain circumstances appearing in evidence, which, as he claims, corroborate the testimony of the defendant and dispute that of the plaintiff, the most significant of these being, that on the plaintiff's books the goods sold appear charged to Burger and Coon. This circumstance, undoubtedly, if unexplained, would be entitled to considerable weight, though it would be by no means conclusive. Some explanation, however, is furnished by the evidence of the plaintiff's book-keeper, by whom the entries were made, who testifies that at the time the goods were sold, he understood that they were for the defendant, and were to be paid for by him, but that he charged them to Burger & Coon because they were delivered to them, that being his practice in such cases. After considering all the circumstances in proof tending to corroborate the respective witnesses, we are not prepared to say that there is any such clear and manifest preponderancesof the evidence in favor of the defendant as would justify us in setting the verdict aside, for that reason."

pose by this measure. When the rug was sold to Mrs. Applebum, his shabby-in-law, was paid for it on delivery. Upon which circumstance the trial judge might reasonably conclude, as he said it without a jury, that the transaction, both of purchase and sale, was designed to benefit [illegible] strangers in the village like which deserved the account books of the general [illegible] merchandise, also [illegible]. It [illegible] by entries thereof, or the failure of any entries regarding the same, from the collection of the exact [illegible] from Mrs. Applebum followed by the [illegible] of the food [illegible] company. For our part we find the trial judge in giving greater evidence and weight to the proofs of plaintiff than we proved to [illegible] of defendant.

Point v, Brief, 8 Ill. App. 208, is analogous to the instant case, in which the court [illegible] alia said:

> "As to whether such contract was made, the evidence is conflicting. The testimony of Hooker and Ruhl being directly contradictory. Counsel for defendant urge that plaintiff [illegible] strongly in evidence, which, as he claims, neutralizes the testimony of the defendants and displays bias of the plaintiff, the most significant of these being, that on the plaintiff's books the goods sold appear charged to Harper and Co. This circumstance, undoubtedly, if unexplained, would be justified as unfavorable weight, though it would be by no means conclusive. Less explanatory, however, is furnished by the evidence of the plaintiff's book-keeper, by whom the entries were made, who testifies that at the time the goods were sold, he understood that they were for the defendant, and were to be paid for by him, but that he entered them to Harper i Ross because they were delivered to them, that being his practice in such cases. After considering all the circumstances in proof tending to establish the respective situations, we are not prepared to say that there is any such clear and weighty preponderance of the evidence in favor of the defendants as would justify us in setting the verdict aside, for that reason."

In Voltz v. Stephani, 46 Ill. 54, it was held that in an action brought by A against B and C, partners, to recover for certain goods alleged to have been sold to them, and the proof was conflicting as to whether the credit for the same had been given to them, or to one D, the mere fact that the goods were delivered to D, and the bills for the same made out in his name, was not conclusive evidence that the credit was given to him. The question was for the jury to determine, upon the whole of the evidence. So in this case, on the conflicting evidence, it was for the trial judge to determine to whom the credit was really given, and to whom the rug was sold; and we are firmly of the opinion that the trial judge solved the conflict correctly.

We find no reversible error in this record. Therefore the judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND WILSON, J. CONCUR.

In Wright v. Hoagland, 40 Ill. 64, it was held that in an action brought by A against B and C, partners, to recover for certain goods alleged to have been sold to them, and the proof was conflicting as to whether the credit for the same had been given to them, or to one C, the case that one was given was mentioned to C, and the bills for the same made out in his name, was not exclusive evidence that the credit was given to him. The question was for the jury to determine, upon the whole of the evidence. So in this case, on the conflicting evidence, it was for the trial judge to determine to whom the credit was really given, and to whom the rug was sold, and as the finding of the opinion that the trial judge solved the conflict correctly.

We find no reversible error in this record. Therefore the judgment of the municipal court is affirmed.

Trial, 1.1. Affirmed. — Opinion.

167 - 31778

SECOND SECURITY NATIONAL BANK OF CHICAGO, a corp., Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
M. L. FRANK, A. G. SCHROEDER and W. I. DENNY,	
On appeal of W. I. DENNY, Appellant.	

Opinion filed Dec. 21, 1927.

MR. JUSTICE HOLDOM delivered the opinion of the court.

The defendants in this suit are M. L. Frank, A. G. Schroeder and W. I. Denny. On a trial before the court and jury there was a verdict against the defendant (who was W. I. Denny) for $2465.81. The usual motions for a new trial and in arrest of judgment were made and denied, and a judgment was entered upon the verdict for $2465.81, and defendant appeals.

Defendant argues for reversal that the amended statement of claim did not state a cause of action; that improper evidence was admitted against defendant Denny, and that the court erred in amending the verdict of the jury, and that the note sued upon was a renewal of a former note and given without the knowledge of defendant, and that the taking of the same by plaintiff had the effect of discharging defendant from further liability.

The defendant was sued upon his claimed liability

[illegible] DEVELOPMENT LIMITED [illegible]
[illegible] Limited, a [illegible],

Appellant,

v.

E. L. FRANK, A. G. [illegible]
and T. I. Smith,

Respondents.

Opinion filed Dec. 21, 1927.

Mr. JUSTICE [illegible] delivered the opinion of the court.

The defendants in this case are T. L. Frank, A. G. [illegible] and T. Smith. On a trial before the court and jury there was a verdict against the defendant (who was T. I. Smith) for $[illegible]. The usual motions for a new trial and in arrest of judgment were made and denied, and a judgment was entered upon the verdict for $[illegible], and defendant appeals.

Defendants argue for reversal that the amended statement of claim (if not even a mere of action) that Jacobson contains no cause against defendant Smith, and that the court erred in sending the verdict of the jury, and that the most that such was a renewal of a lease made and given without the knowledge of defendant, and that the taking of the same by plaintiff had the effect of discharging defendant from further liability.

The defendant was not even his alleged liability

under a guaranty in the following words:

> "We hereby request the Second Security Bank of Chicago to give and continue to give to M. L. Frank Furniture Co. credit as it may desire from time to time and in consideration of all and any such credit given it, we, individually, and collectively hereby guarantee payment when due of any and all indebtedness now due or which hereafter may become due from M. L. Frank Furniture Co. to said bank, howsoever created, or arising, or evidenced to the extent of $2,500.00, and waive notice of the acceptance of this guaranty, and of any and all indebtedness at any time covered by the same. This guaranty shall continue until written notice from each of us of the discontinuance thereof shall be received by the said Second Security Bank of Chicago.
>
> Signed at Chicago, Illinois, this 20th day of October, 1935.
>
> (signed) M. L. Frank (Seal)
> (signed) A. G. Schroeder (seal)
> (signed) W. I. Denny (seal)"

The defendant Denny was the only defendant served with process, and the only one who appeared in the case.

It appears from the amended statement of claim that defendants, M. L. Frank, A. G. Schroeder and W. I. Denny, for a valuable consideration gave a guaranty to the plaintiff above set out in haec verba, and that on or about April 8, 1936, while the same was in full force the said M. L. Frank Furniture Company, whose indebtedness was guaranteed, for a valuable consideration delivered its promissory note to the plaintiff, dated April 5, 1936, due 30 days after its date, for $2500; that the said note had not been paid, and that the defendant Denny, on May 11, 1936, and on other occasions after said note became due, expressly agreed that he would pay the same in full, but that said note had not been paid by him or by any one else.

under a guaranty in the following words:

> "We hereby induce Mr. Frank Dorothy Dorr of Chicago to give and continue to pave to W. L. Frank Investors Co. credit as he may desire from time to time and in consideration of all and any such credit given it, we, individually, and collectively hereby unconditionally guarantee the payment of all indebtedness now or hereafter owing by the said Frank Dorr to said Investors Co. Frank Investors Co. by said Dorr, however evidenced or existing, as evidenced to the extent of $3,000.00, and waive notice of the acceptance of this guaranty, and of any and all indebtedness at any time accepted by the same. This guaranty shall expire upon receipt of notice from each of us of the discontinuance thereof shall be received by the said Frank Dorr by the hour of 12 o'clock noon.
>
> Signed at Chicago, Illinois, this 20th day of October, 1922.
>
> (signed) L. L. Frank (seal)
> (signed) L. L. Schwarder (seal)
> (signed) V. I. Dorr (seal)"

The defendant Dorr was the only defendant served with process, and the only one who appeared in the case.

It appears from the amended statement of claim that defendants, F. L. Frank, L. G. Schwarder and V. I. Dorr, for a valuable consideration gave a guaranty to the plaintiff above set out in haec verba, and that on or about April 8, 1922, while the same was in full force the said W. L. Frank furniture company, whose indebtedness was guaranteed, for a valuable consideration delivered its promissory note to the plaintiff, dated April 8, 1922, due 30 days after its date, for $3000; that the said note had not been paid, and that the defendant Dorr, on May 11, 1922, and on other occasions after said note became due, expressly agreed that he would pay the same in full; and that said note had not been paid by him or by any one else.

Defendant made a motion to strike said amended statement of claim from the files, which motion was overruled. Defendant did not stand by his motion, but filed an affidavit of merits to the statement of claim as amended. Defendant claimed that the note sued upon was an extension of payment of a previous note given, and that such extension was given without the knowledge of or ratification by defendant, and that he was thereby released from his liability under the guaranty.

Defendant by pleading to the merits and proceeding to trial thereon waived any defects in plaintiff's statement of claim, (Belke v. Bush, 213 Ill. App. 28), providing plaintiff's amended statement of claim stated a cause of action, which it did, and any defects therein were cured by verdict (Kellcher v. Chicago City Ry. Co., 256 Ill. 454).

The verdict of the jury was "We, the jury find the issues against the defendant, and assess the plaintiff's damages at the sum of $2,465.81."

The clerk erroneously entered the verdict against all three defendants, and on motion duly made the record entry of the verdict was by order of the court changed to read, "We, the jury, find the issues against the defendant, G. L. Denny, and assess the plaintiff's damages at the sum of $2465.81."

The jury's verdict was not changed by the court, but the erroneous entry thereof by the clerk was changed so that the record was in accord with the verdict of the jury as rendered.

Defendant made a motion to strike said amended statement of claim for failure, which motion was overruled. Defendant did not object to his motion, but filed an affidavit of merits to the statement of claim as amended. Defendant claimed that the note sued upon was an extension of payment of a previous note given, and that such extension was given without the knowledge of an accommodation by defendant, and that he was thereby relieved from his liability under the contract.

Defendant by demurring to the merits and proceeding to trial without giving any objects in plaintiff's statement of claim, (Mills v. Dunn, 388 Ill. App. 28), proceeding plaintiff's amended statement of claim waived a cause of action, which it did, and any defects therein were cured by verdict (Lightner v. Chicago M.R. Co., 188 Ill. 286).

The verdict of the jury was "We, the jury find the issues against the defendant, and assess the plaintiff's damages at the sum of $1,458.81."

The last contention attacks the trial court ruling that the evidence, and no other, may make the amount of the verdict was by reason of the court changed to read, "We, the jury, find the issues against us in favor of P. E. Money, and assess the plaintiff's damages in the sum of $1458.81."

The jury's verdict was not changed by the court, but the correction only thereof by the clerk was changed so that the record was in accord with the verdict of the jury as rendered.

It was proper for the court to proceed to try the issues, as joined against the defendant, W. I. Denny, and to enter judgment thereon, as provided by Section 14, Chapter 110, Smith-Hurd Rev. Stat. 1935, which provides that if a summons or capias is served on one or more but not on all of the defendants, the plaintiff may proceed to trial and judgment against the defendant or defendants on whom process is served, and plaintiff may at any time afterwards, have a summons, in the nature of scire facias, against the defendant not served with the first process, to cause him to appear in court, and show cause why he should not be made a party to such judgment. So that the proceeding was regular and the judgment against defendant in accord with the statute, and plaintiff may hereafter, if he so chooses, sue out a scire facias to make the other defendants not served, parties to the judgment. Berry v. Krone, 48 Ill. App. 83.

The guaranty of defendant and his co-defendants was sufficiently broad to cover any indebtedness accruing subsequent to the execution of the guaranty for any sum not exceeding $2500. Even though the extension of payment of the note was granted by plaintiff without the consent of defendant, he will be bound to make payment, if after the extension, he promises to pay the indebtedness. Such promise need not be in writing, nor is it necessary that there should be a new consideration. First National Bank of Monmouth v. Whitman, 68 Ill. 331.

On the question of the promise of defendant to pay the note there is conflicting evidence. Grau, the cashier of the plaintiff bank, swore that Denny did so promise, and

It was proper for the court to proceed as it
did therein, as joined with the defendant, v. I. Leary,
and to make judgment thereon, as provided by Section 14,
Chapter 110, Revised Laws, 1902, with reviews
that if a summons or pleading is served on one or more but
not on all of the defendants, the plaintiff may proceed to
enter judgment against the defendants or defendants so
when received is served, and plaintiff may at any time after-
wards, have a summons, in the nature of mesne process, against
the defendant not served with the first process, to cause him
to answer in court, and show cause why he should not be made
a party to such judgment. So that the proceeding was regular
and the judgment against defendant is secured with the estate,
and plaintiff may foreclose, if he so chooses, but not a
mere finding to make the other defendants not served, parties
to the judgment. Avery v. Stone, 68 Ill. App. 82.

The pendency of defendant and its co-defendants was
sufficiently cited to serve for jurisdictional purposes
court to the exclusion of the pendency for any one not succes-
ing title. Then, during the retention of jurisdiction of the new
was pending in plaintiff without the service of defendants, he
will be held to the jurisdiction, if that be retained, to pro-
ceed to hear the judgment. The proceeding does not be in
rating, but is it necessary that there should be a new
establishment. Ford Motor Co. of Canada v. Miller,
58 Ill. App.

In the question of the pendency of defendant to the
the date that it initially filed. Long Mr. Walker
of the plaintiff bank, made this same did on pending, and

Denny denies that he made any such promise. The jury's province was to determine from the testimony of these two witnesses and the environing circumstances as to which one of them they would believe, and with their finding we see no cause to disagree.

It is not disputed by defendant but that he would have been liable upon the first note, of which the one in suit, he claims, is a renewal. If this contention be well taken, then the first note has not been paid, and he would still be liable thereon. On a similar contention the court said in Commercial Loan & Trust Co. v. Wallers, 141 Ill. App. 460;

> "But be this as it may, it is patent that as to appellant the appellee is liable on one of the notes. If the second note was indorsed without authority and such indorsement has not been subsequently ratified by appellee, then he remains liable to appellant upon the first note, for in contemplation of law that note has not been paid. As said in Eagle Bank v. Smith, 5 Conn. 74, 'whether he was or was not their agent, the legal consequences are precisely the same. The defendants cannot take benefit of a pretended payment of the note by a stranger, if the payment was fictitious and not actual.' Appellee cannot disaffirm the action of his son in indorsing his name upon the new note, and thereby escape the obligation of paying it, and affirm the son's action as paying the note in faith of the unauthorized indorsement. So that appellee, in repudiating his liability upon the second note, assumes the obligation to discharge his liability arising from his guarantee of the first note. Henderson v. Cummings, 44 Ill. 325; Dodge v. Turlock, 110 Mich. 480; Tasker v. Kenton Ins. Co., 59 N.H. 438."

Nothing has occurred since the giving of the first note to change defendant's liability thereon. He has not lost the benefit of any collateral security, nor has he by the extension incurred any additional liability or different liability on the note in suit under the guaranty in evidence.

The opinion of this court in the Mallers case was affirmed by the Supreme Court in 337 Ill. 119.

We find no reversible error in the record before us and the judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND WILSON, J. CONCUR.

247 I.A. 614

190 - 31801

A. WEINRAUB, doing business as the ATLAS WINDOW CLEANING COMPANY, Appellee,	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
v.	
AVERY BRUNDAGE, Appellant.	

Opinion filed Dec. 31, 1927.

MR. JUSTICE HOLDOM delivered the opinion of the court.

The action is assumpsit. Defendant joined issue on a declaration of several counts, among which was one declaring on a quantum meruit for work done and materials furnished under a special agreement, by filing pleas of the general issue and one of set-off, to which plea of set-off plaintiff filed a general replication.

The subject matter of the work to be done by plaintiff for defendant was to clean all the windows and sky lights of a new building of The Ford Motor Company at 126th Street and Torrence Avenue, in Chicago. The defendant was the general contractor for the construction of the Ford plant. On the issues thus joined there was a trial before the court by agreement. After a hearing the court found the issues for the plaintiff and assessed its damages at the sum of $538, upon which finding judgment was entered, and defendant prosecutes this appeal.

The evidence proved that plaintiff was engaged in the window cleaning business under the name of Atlas Window

A. Ryan, doing business as
the Ryan Window Cleaning Company,
Appellant,

v.

Irvin Wessler,
Respondent.

Opinion filed Dec. 21, 1927.

MR. JUSTICE WILSON delivered the opinion of the court.

The action is assumpsit. Defendant joined issue on a declaration of several counts, among which was one declaring on a quantum meruit for work done and materials furnished under a special agreement, by filing plea of the general issue and one of set-off, to which plea of set-off plaintiff filed a general replication.

The subject matter of the work to be done by plaintiff for defendant was to clean all the windows and skylights of a new building of the Ford Motor Company at 12th street and Cermak Avenue, in Chicago. The defendant was the general contractor for the construction of the Ford plant. On the issues thus joined there was a trial before the court by agreement. Ryan v. Ford Motor Co., 180 Ill. App. 1. The plaintiff had recovered judgment for the sum of $600, upon which finding judgment was entered, and defendant prosecutes this appeal.

The evidence proved that plaintiff was engaged in the window cleaning business under the name of Ryan Window

Cleaning Company; that on June 26, 1924, plaintiff after a conversation with a Mr. Frasier, chief engineer for defendant, submitted a bid for cleaning the sky lights at the Ford plant, in which occurred the following sentence: "As requested we agree to clean all skylights for the sum of $3000." Shortly thereafter plaintiff had another interview with Frasier, in which Frasier said, "We only paid $2,700 to the City Window Cleaning Company. They did pretty near all the work. You are only to complete it. We owe them $1200 and we will give you $1200 to finish the work. I don't want you to take off anything that you can't take off, only what is humanly possible to take off."

Plaintiff testified that nothing was said at either of the foregoing interviews regarding the work being subject to the approval of Struven, the architect.

On July 7, plaintiff, in the name of Atlas Window Cleaning Company, wrote defendant, "As per our verbal agreement made with Mr. A. Weinraub, we are to remove all the paint from all skylights of the Chicago Ford plant, 126th & Torrence Ave., for the sum of $1200. Work has already been started and to be completed as soon as possible. The full account should be paid five days after work is completed."

No reply was received by plaintiff to this letter until August 30, 1924. It was the intention of plaintiff to use chemicals in removing the paint, but he was told by the foreman of the Ford plant not to use chemicals because of the danger of spraying the chemicals on the Ford automobiles which were assembled under the skylights. This set plaintiff

Dancing Company. But on June 26, 1958, plaintiff after a conversation with a Mr. Prentiff, chief engineer for defendant, submitted a bid for dismantling the sky lights at the Ford plant, in which occurred the following conversation: "We represented we agree to clean all asbestos for the sum of $2000." Shortly thereafter plaintiff had another interview with Prentiff, in which Prentiff said: "We only paid $.750 to the City Window Cleaning Company. This job pretty nearly all work. The men are only to complete it. We can use $1000 and we will give you $1000 to finish the work. I don't want you to take off anything that you can't take off, only what is humanly possible to take off."

Plaintiff testified that nothing was said at either of the foregoing interviews regarding the work being subject to the supervision of Ford, the defendant.

On July 7, plaintiff, in the name of Atlas Window Cleaning Company, wrote defendant, "In pursuance of agreement made with Mr. A. Prentiff, we are to remove all the paint and all skylights of the Chicago Ford plant, 1000ft x 50ft x 1ft the min. of $1000. Work has already been started and it is anticipated to move as speedily as possible. The full amount should be paid from time after work is completed."

On July and receipt by plaintiff of this letter until August 20, 1958, in spite the instructions of plaintiff he was cautious in removing the asbestos, but he was told by the foreman of the Ford Plant not to use chemicals because of the danger of mixing the chemicals on the Ford automobiles which were assembled under the skylights. This was plaintiff

to using water, wire brushes and safety razor blades in removing the paint.

On August 18, 1924, plaintiff claims that his men completed the removal of all the paint that could possibly be removed. Thereupon plaintiff notified defendant by letter that he had completed the cleaning of the skylights, and enclosed a bill for $1200. On August 13, 1924, defendant wrote plaintiff a letter insisting that the work had not been completed in a manner satisfactory to the architect's superintendent, and plaintiff claims that this is the first intimation he had that the work was to be done subject to the approval of the architect or his superintendent. On August 19, 1924, plaintiff wrote defendant a letter stating that he would continue cleaning the skylights until he got an O.K. from Mr. Struven, in which letter he referred to the conversation at the time the contract was made, in which it was agreed that if only part of the skylights were to be cleaned the price would be $1200, if Struven would give his O.K., and that if defendant insists on plaintiff cleaning all the skylights the price would automatically change to $3000, and also stating that if that was satisfactory defendant should send plaintiff a check for $1200 for the work already done.

It appears from plaintiff's testimony that the skylights cleaned opened up and out, and within a week after being cleaned they were all smoked up again from smoke and black paint used in the Ford plant, going out in liquid form from the smoke stacks. Work on the job was again started on the 19th of August, 1924, and continued until September 24, 1924, when plaintiff claims the work was done.

to making water, who knows are empty tenor binges in
reporting the point.

On August 13, 1904, plaintiff claims that she was
completed the remarks of all the point that could reasonably
be received. Thereupon plaintiff notified defendant by letter
that he had complained the cleaning of the skylight, and requested
a bill for dismiss. On August 15, 1904, defendant wrote plain-
tiff a letter insisting that the work had not been completed
in a manner satisfactory to the plaintiff's representative,
and plaintiff claims that upon its first instructions he had
that the work was to be done subject to the approval of the
architect or his representative. On August 18, 1904, plain-
tiff wrote defendant a letter stating that he would continue
cleaning the skylights until he got an O.K. from Mr. Stevens.
In such letter he referred to the conversation of the time
the contract was made, in which it was agreed that if only
part of the skylights were to be cleaned the price would be
$100, if others could give the O.K., and that if instead
include on plaintiff cleaning all the skylights the price
would accordingly course to $200, and also stating that
if that was satisfactory defendant should send plaintiff
a check for $100 for the work already done.

It appears from plaintiff's testimony that the
skylights cleaned opened up and out, and within a week after
being cleaned they were all smoked up again from smoke and
black paint used in the yard (sic), going out in limit from
the house stacks. Back on the job was again started
on the 19th of August, 1904, and continued until September
24, 1904, when plaintiff claims the job was done.

It also appears in evidence on the part of plaintiff that he paid out for labor on the job $2900 and $500 for ladders, scrapers, brushes, car fare and other miscellaneous expense; that defendant refused to pay plaintiff for the work done, and that nothing has been paid by defendant to plaintiff for work done by him in cleaning the skylights. Plaintiff quit the job and thereafter defendant employed one Friedman to finish it; that he was paid therefore the sum of $2462.

The trial judge found that plaintiff was entitled to $3000 and that as a set-off thereto defendant was entitled to be allowed a credit of $2462 for work done in completing the job, which plaintiff should have completed. The finding of the court of $538, upon which judgment was entered, is the difference between the amount due on the set off and the amount of the contract price of $3,000.

The declaration was in all respects sufficient to justify the finding and judgment in this case, providing the proofs are sufficient, and we find them to be so.

In Smith v. Bellrose, 200 Ill. App. 368, the court held that where the plea of set off which did not deny the plaintiff's cause of action, by implication admits an indebtedness. Such is the effect of defendant's plea of set-off in the case under consideration. In the plea of set-off defendant avers "that the plaintiff was before and at the time of the commencement of this suit, and still is, indebted to him, the defendant, in the sum of $3,000 for damages of the defendant suffered by him by reason ofthe breach by the plaintiff of the certain agreement made by and between

In this context, in evidence on the part of plaintiff that he paid out for labor on the job $[illegible] and $[illegible] for lumber, sawyers, hammer, saw fare and other miscellaneous expenses; that defendant refused to pay plaintiff for the work done, and that nothing has been paid by defendant to plaintiff for work done by him in erecting the skylights. Plaintiff quit the job and thereafter defendant employed one Friedman to finish it; that he was paid wherever the sum of $[illegible].

The trial judge found that plaintiff was entitled to $[illegible] and that as a cross-complaint defendant was entitled to be allowed a credit of $[illegible] for work done in completing the job, which plaintiff should have completed. The finding of the amount of $[illegible], upon which judgment was entered, is the difference between the amount due to the net off and the amount of the initial price of $[illegible].

The indentation was in all respects sufficient to justify the finding and judgment in this case, providing the proofs are sufficient, and we find them to be so.

In Smith v. Williams, 88P (2d. Ap), 588, the court held that where the plea of set off which did not show the plaintiff's cause of action, or justification which is indefinite, [illegible] in the defendant's plea of set-off in the same manner [illegible]. In the plea of set-off defendant avers "that the plaintiff was before and at the time of the commence of this suit, and still is, indebted to him, the defendant, in the sum of $[illegible] for damages of the defendant suffered by him by reason office fraud by the plaintiff of the certain agreement made by and between [illegible]

the plaintiff and the defendant on, to-wit: July 7, 1924, wherein and whereby the plaintiff undertook with the defendant to remove all the paint from all of the skylights of a certain manufacturing plant, to-wit: known and described as the Chicago Ford Plant * * * for the sum and amount of $1200, which said contract the plaintiff did not perform whereby it then and there became necessary for the defendant to procure the doing of the said work by other persons and this the defendant then did to his damages aforesaid in the sum and amount of, to-wit: $3,000, which said sum of money so due from the plaintiff to the defendant as aforesaid exceeds the damages sustained by the plaintiff by reason of the non-performance by the defendant of the several supposed promises in the said declaration mentioned, and out of which said sum of money the defendant is ready and willing and hereby offers to set off and allow to the plaintiff the full amount of said damages, etc."

By the averments of this plea of set-off the defendant admitted the contract between the parties for cleaning the skylights of the Ford Plant, as set forth in the several counts of plaintiff's declaration in varying form. This left for the consideration and determination of the court what amount was due either plaintiff or defendant, as shown by the proofs.

The record discloses that the trial judge heard all of the evidence proffered by the parties under the pleadings, and from a careful perusal of the same we conclude that the trial judge might reasonably find, as he did, that the plaintiff was entitled to the sum of $3,000 under his contract;

the plaintiff was the defendant on, towit: July 7, 1904, where and whereby the plaintiff undertook with the defendant to receive all the paint from all of the skylights of a certain manufacturing plant, towit: Ferris and Hamilton as the Gilmore Paint Plant " " for the sum and amount of $1800, which said contract the plaintiff did not perform whereby it has not been necessary for the defendant to procure the doing of the said work by other persons and thus the defendant has did to his damage aforesaid in the sum and amount of, towit: $1,000, which said sum of money is due from the plaintiff to the defendant as aforesaid exclusive the damage sustained by the plaintiff by reason of the non-performance by the defendant of the several mutual promises in the said definition mentioned, and out of which said sum of money the defendant is ready and willing and hereby offers to set off and allow to the plaintiff the full amount of said damage, etc."

By the assumpsit of this plea of set-off the defendant admitted the contract between the parties for cleaning the skylights of the Paint Plant, as set forth in the several counts of plaintiff's declaration in varying form. This left for the consideration and determination of the court what amount was due either plaintiff or defendant, as shown by the proofs.

The court finds that the skylights being part of the exterior machinery by the position under the plaintiff, and from a careful perusal of the case we conclude that the full price eight hundred (1800) is to be, that the plaintiff was entitled to the sum of $1,000 under his contract;

that plaintiff having failed to complete his contract, and defendant having procured another to complete the same at an expense of $2462, that defendant was entitled to be allowed that sum against plaintiff's claim under his plea of set-off. The finding in favor of the plaintiff for the sum of $538, and the judgment thereon is fully sustained by the evidence in this record.

The record discloses no reversible error and the judgment of the Superior Court is therefore affirmed.

AFFIRMED.

TAYLOR, P.J. AND WILSON, J. CONCUR.

this plaintiff having failed to establish his contention, and defendant having financial ability to complete the main or an expense of $2500, that defendant was entitled to be allowed that sum against plaintiff's claim under his plan or contract. The finding in favor of the plaintiff for the sum of $500, and the judgment thereon is fully sustained by the evidence in this record.

The record discloses no reversible error and the judgment of the Superior Court is therefore affirmed.

AFFIRMED.

PATTON, J., not sitting, by assign.

206 - 31817

MORRIS ECKER, Appellee, v. WALTER LEVIN, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Dec. 21, 1927.

MR. JUSTICE HOLDOM delivered the opinion of the court.

On a trial before the court by the agreement of the parties, there was a finding for the plaintiff in the sum of $206.25, and a judgment thereon and defendant brings the record to this court for review.

The claim in suit is for the painting and decorating an apartment of defendant at 1506 North Kedzie avenue, Chicago.

There is no dispute about the doing of the work. However, defendant claims that the work done was paid for. The whole difficulty arises from the fact that plaintiff and his partners, Colburg & Hueckberg, had a contract with defendant for the decorating of an apartment building at Washington Boulevard and Long Avenue, Chicago, in consideration of which plaintiff promised defendant that he would decorate the dining room in defendant's apartment, his private home, at 1506 North Kedzie Avenue, Chicago. While the last named work was in progress defendant requested plaintiff to do additional work in the apartment, which plaintiff then stated would cost from $400 and $500, and defendant told plaintiff to proceed with the work.

Plaintiff testified that the total cost of the additional work and materials was $206.25, for which he rendered statements to defendant. These statements had no connection with the building at Washington Boulevard and Long Avenue. Defendant asked plaintiff to wait for payment of his bill of $206.25 for decorating the apartment at 1506 North Kedzie Avenue, until the Washington Boulevard and Long Avenue building had been completed and settled for.

The contract was personal between defendant and plaintiff, with which defendant's co-partners had nothing whatever to do, and which in no way included the Washington Boulevard and Long Avenue contract. The bill for the Kedzie Avenue flat decoration was rendered to defendant by the plaintiff.

Plaintiff's work on the Washington Boulevard and Long Avenue building was completed in October, 1925, and payment therefor had been substantially made with the exception of a balance of $75, for which plaintiff rendered a statement to defendant on December 1, 1925. It was admitted that the $75 bill was on account of work on the Washington Boulevard and Long Avenue Building. Defendant testified "that was for extra work on Washington Boulevard for $75." By arrangement that claim was settled on March 6, 1926 for $48.25.

In April, 1926, in a talk between them about the claim the defendant said, "what! do you suppose, I am going to pay for any bills for decorating my own apartment? If

Plaintiff testified that the total cost of the additional work and materials was $[illegible], for which he received payments totaling $[illegible]. Other witnesses had no connection with the building at Washington Boulevard and Long Avenue. Defendant sought unsuccessfully to wait for payment of his bill of $[illegible] for demolishing the apartment at [illegible] Adams Street, until the Washington Boulevard and Long Avenue building had been completed and settled for.

The contract was personal between defendant and plaintiff, with which defendant's co-partners had nothing whatever to do, and which in no way included the Washington Boulevard and Long Avenue contract. The bill for the Adams Avenue flat demolition was rendered to defendant by the plaintiff.

Plaintiff's work on the Washington Boulevard and Long Avenue building was completed in October, 1908, and payment therefor had been withheld pending with the completion of [illegible] [illegible], for which plaintiff rendered a statement to defendant on December 1, 1908. It was admitted that the $75 bill was on account of work on the Washington Boulevard and Long Avenue building. Defendant testified that the [illegible] work on Washington Boulevard for $[illegible] by arrangement that claim was settled on March 4, 1909 for $[illegible].

In April, 1908, in a bill rendered than about the claim the defendant said, "Sure! Go ahead, I am going to pay for my bill [illegible] demolishing my own apartment." It

you want any money go ahead and collect."

The contract price for decorating, etc. the Washington Boulevard and Long Avenue building was $5600. Defendant by his affidavit of merits does not deny the doing of the work, but claims that the work was included in the price of the Washington Boulevard and Long Avenue building $5600, which had been fully paid.

Defendant contends that the silence of plaintiff with reference to his claim for 15 or 16 months before commencing suit is "conclusive against the plaintiff". There is no merit in this contention. The contract being oral plaintiff could sue therefor at any time within the five year statute of limitations, by which such rights of action are controlled.

We think the trial judge might reasonably find from the preponderance of the evidence that the decorating done by plaintiff for defendant at his Kedzie Avenue apartment was done for defendant at his request, and had nothing whatever to do with the work done at Washington Boulevard and Long Avenue by plaintiff's firm of Levin, Colburg & Kueckberg.

Moran v. Gordon, 33 Ill. App. 46, we think is applicable, to this case where the court said: " * * The failure to object to the account was evidence tending to prove an account stated. * * * Whether silence for an unreasonable time, under such circumstances, amounts to an admission of the correctness of the account, and whether the delay was unreasonable, are questions of fact for the jury." * *

you must not money on hand and collect."

The contract price for decorating, etc. the Washington Boulevard and long Avenue building was $2000. Defendant by his affidavit of merits does not deny the doing of the work, but claims that the work was included in the price of the Washington Boulevard and long Avenue building $2000, which it has fully paid.

Defendant contends that the silence of plaintiff with reference to his claim for 18 or 12 months before commencing suit is "conclusive against the plaintiff". There is no merit in this contention. The contract being oral plaintiff could sue thereon at any time within the five year statute of limitations, by which such rights of action are restricted.

We think the trial judge might reasonably find from the preponderance of the evidence that decorating done by plaintiff for defendant at his Yadkin Avenue apartments was done for defendant at his request, and has nothing whatever to do with the work done at Washington Boulevard and long avenue by plaintiff's firm of Levin, Kinney & Jacobson.

Cohen v. Jackson, 36 Ill. App. 46; we think in applicable, in this case where the court said: "* * * the failure to object to the account was evidence tending to prove an account stated. * * * Another claim for an unreasonable time, under such circumstances, amounts to an admission of the correctness of the account, and whether the delay was unreasonable, was question of fact for the jury." * *

In this case the court took the place of the jury, and its finding is to be treated with the same respect as the verdict of a jury."

Plaintiff's testimony was in some particulars corroborated by another witness, and we think the court might therefrom decide that the preponderance of the evidence was with the plaintiff.

We are not permitted to disturb the finding of a judge on a trial before him, where he saw the witnesses and heard them testify, and was able to judge of their credibility, unless we can from all the evidence and the environing circumstances say that the finding of the judge was decidedly against the weight of the evidence. This we are unable to do.

In defendant's brief he charges that "it is evident from the record that the contention of the defendant made little impression on the court." We will assume if such statement be true that inconsistencies of the defense, as developed by the proofs, influenced the trial judge to reach the conclusion which he did. After a careful consideration of the record and of the briefs, we are likewise impressed.

The record is without reversible error and the judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND WILSON, J. CONCUR.

In this case the court took the place of the jury. And its finding is to be treated with the same respect as the verdict of a jury.*

Blackiff's testimony was in some particulars corroborated by another witness, and we think the court might properly assume that the preponderance of the evidence was with the plaintiff.

We are not concerned to discuss the finding of a judge in a trial before him, where issues of misconduct and breach were tried, and was left to judge of their credibility, unless we can know all the evidence and the surrounding circumstances, that the finding of the judge was unfairly against the weight of the evidence. That we are unable to do.

In defendant's brief he charges that "it is without fair the result that the conduct of the defendant was such little expression on the court." We will assume if such statement be true that inconsistencies of the witnesses, as developed by the proofs, influenced the trial judge to reach the conclusion which he did. After a careful consideration of the record and of the briefs, we are likewise impressed.

We commit no without reasonable error and the judgment of the municipal court is affirmed.

282 - 31833

247 I.A. 615

PEOPLE, ex rel VITAGRAPH, INC., Appellee, v. WILLIAM E. DEVER, ET AL, Appellants.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

Opinion filed Dec. 21, 1927.

MR. JUSTICE HOLDOM delivered the opinion of the court.

The People, upon the relation of Vitagraph, Inc., relator, filed its petition in the trial court, praying that a writ of mandamus issue directing the respondents, William E. Dever, as Mayor of Chicago, and Morgan A. Collins, as Superintendent of Police, to issue a permit for a photoplay known as "My Official Wife", authorizing the showing of that picture in the City of Chicago.

The respondents, the Mayor and the Chief of Police, answered the petition, to which a replication was filed. Upon the issues thus formed the case was tried before the court and a jury. The jury in their verdict found the issues for the relator, Vitagraph, Inc. Motions for a new trial and in arrest of judgment were made, and both being overruled the following order was entered:

> "Therefore, it is considered by the court that the peremptory writ of mandamus issue against William E. Dever, Mayor of the City of Chicago; Morgan A. Collins, as Superintendent of Police of the Department of Police of the City of Chicago, and against relator herein, to exhibit in the said City of Chicago the photoplay entitled, 'My Official Wife' in form as introduced in evidence in this case and that the said petitioner do have and recover of and from the defendants its costs and charges in this behalf expended."

from which judgment the respondents prayed and perfected this appeal and bring the cause to this court, seeking a review of the record and a reversal of the judgment.

The abstract sets forth the common law record, the pleadings of the several parties, the evidence and proofs, and no more. The bill of exceptions, as abstracted, sets forth the placita, showing that the cause came on for trial October 20, 1926, before the Honorable Oscar W. Torrison, one of the judges of the Circuit Court of Cook County, sitting on the common law side thereof, and a jury, and that the cause came on for trial on the pleadings theretofore filed therein, citing the appearances of counsel for the respective parties.

The abstract of the bill of exceptions further shows, "Counsel for petitioner offered in evidence the photoplay 'My Official Wife', which was exhibited by means of a suitable projection machine, to the court and jury on October 20th, 1926." and further recited, "Whereupon both sides rested, which was all the evidence offered or received on the trial of the above entitled cause."

The abstract of the bill of exceptions also sets forth all of the instructions given by the court to the jury.

The evidence offered on the trial is not in the bill of exceptions, and the photoplay "My Official Wife" has not been exhibited to the justices of this court. We are, therefore, entirely in the dark as to whether or not the picture is immoral, showing, as the respondents aver in their answer "that the entire theme of said story revolves

Five white judges the jurisdiction proper and reversed this appeal and bring the cause to this court, making a review of the record but a reversal of the judgment.

The pleadings were filed the cause in court, the pleadings of the several parties, the evidence and proofs, and no more. The bill of exceptions, as therefore, sets forth the pleadings, showing that the cause came on for trial before Jl. Lane, before the plaintiff jury in trial, the of the judges of the circuit court of Cook County, sitting on the common law side thereof, and a jury, and that the cause came on for trial on the pleadings therefore filed therein, noting the appearance of counsel for the respective parties.

The abstract of the bill of exceptions further shows, "Counsel for petitioner offered in evidence the photograph 'by official Wife', which was exhibited by means of a suitable projection machine, to the court and jury on October 20th, 1899." and further recited, "Whereupon both sides rested, with all the evidence offered or received on the trial of the above entitled cause."

The abstract of the bill of exceptions also sets forth all of the instructions given by the court to the jury.

The evidence offered on the trial is not in the bill of exceptions, and the photograph "by official Wife" has not been exhibited to the judges of this court. The use, therefore, entirely in the dark as to whether or not the plaintiff in Lane, Jl. Lane, in the instructions ever is that cause that the certain chase of this error requires

around the obviously consummated rape of the heroine designated in the picture as Sonia Veronoff;" or determine whether, as averred in the answer of respondents, "the said photoplay is not immoral and deny that the said photoplay is not obscene, but state the fact to be that the said photoplay is immoral and obscene, and that in their opinion it would create a harmful impression on the minds of children and adolescents and impressionable adults."

This is a court of review. The abstract is the pleadings of the parties, and within its limitations this court will search the record. We are, therefore, unable to give our judgment upon facts which were developed before the trial court and the jury, but which facts are withheld from us.

In Beaverns v. Lischinski, 82 Ill. App. 396, the court cites C. B. & Q. R. R. Co. v. Burton, 53 Ill. App. 69, in which the court said:

> "The jury were permitted, upon the request of the railroad company and with the consent of the plaintiff, to go in a body and view the crossing there in question, and the Appellate Court of the Third District, speaking through Mr. Justice Pleasants, held that the jury having had important evidence before them, not preserved in the bill of exceptions, the presumption was that the evidence not preserved warranted the finding. There are other cases that hold the same way. That of N.C.St. R.R. Co. v. Eldridge, 51 Ill. App. 480 (this district), was a suit for personal injuries for an accident to the appellee by being caused to trip or stumble on account of a bolt or something that protruded above the floor of a street car, and by consent of both parties the jury inspected the car, itself, which was agreed was at the time of inspecting it in the same condition as at the time of the accident. It is said in the opinion of the court: 'What they (the jury) saw, we have no means of knowing and can not review. Whatever, if anything, was lacking in the other evidence to convict the appellant of negligence we must presume was supplied by such inspection. * * * Their (the jury's) finding rests in part at least upon evidence derived from a personal inspection of the bolt in the car itself, which is not before us, but binds us.'"

stand the intrinsically unessential fact of the testator distinguishing in the nature on Linda Vincent;" or determine whether, as asserted in the manner of evidence, "the mail situation is not immoral and deny that the mail photography is not obscene, but state the fact to be that the mail photography is immoral and obscene, and that in their opinion it would create a baneful impression on the minds of children and adolescents and instructionally adult."

This is a court of review. The statement is the phrasing of the proviso, and while the jurisdiction the court will assert the record, we are, therefore, unable to give new judgment were facts which were immaterial before the trial court and the jury, but which facts are withheld from us.

In Commonwealth v. Lindenmuth, 88 III. App. 328, the court said: C. B. C. C. Co. v. Burton, 88 III. App. 52, in which the court said:

"The jury were permitted, upon the request of the minimum counsel and with the consent of the plaintiff, to go in a body out view an premises into in question, and the appellate court of the third district, approving through Mr. Justice Freeman, held that the jury having had important evidence before them, not preserved in the bill of exceptions, the presumption was that the evidence not preserved warranted the finding. There are other cases that hold the same way. Thus of C. B. C. C. Co. v. Pickens, 61 III. App. 480 (this district), was a suit for personal injuries for a factory worker resulting in being burned by grip or crucible on account of a defective or machine. Was introduced above the floor of a closed car, and by consent of both parties the jury inspected the car. Finally, which was agreed was at the time of inspecting it in the same condition as at the time of the accident. It is said in the opinion of the court: 'Had the (the jury) not, we have no doubt of inspecting the car and duty. However, if certain, we judge in the court's opinion to merits in evidence in equivalent of equivalent to that inspection was supplied by such inspection. * * * Their (the jury's) finding rests in part as such upon evidence derived from a personal inspection of the grip in the car itself, which is not before us, but which we."

Beaverns v. Lischinski, 181 Ill. 358, affirmed the judgment of the Appellate Court in the same case, supra.

Ziegler v. Jewel Tea Co., 209 Ill. App. 238, is to the like effect, in which the court said in referring to some absent exhibits:

> "We must, in the absence of these exhibits, which were manifestly necessary for a proper determination of the case, presume that if they were made a part of the record, they would show that the trial court was justified in entering the decree appealed from. Abel v. Poe, 188 Ill. App. 391; Roy v. Galloway, 54 Ill. App. 610; Fred Miller Brewing Co. v. Beckington, 54 Ill. App. 191; Spangenberg v. Charles, 44 Ill. App. 536; Imperial Hotel Co. v. H. B. Claflin Co. 85 Ill. App. 337."

In Holton v. Darling, 84 ibid. 488, the court said in referring to a view of certain premises by the jury:

> "What the jury saw there we are not advised by the record, but must presume that they saw enough, in addition to the evidence, to justify their verdict."

In Dahl v. MacDonald Engineering Co. 141 Ibid. 187, the court said:

> "It is assigned as error that the verdict is contrary to the evidence; also that it is unsupported by the evidence, and the chief contest between the parties is in respect to these assignments of error.
> Now, in order to pass intelligently or safely on these questions, we should have before us the same evidence which was before the jury. The model was before the jury, and they had an opportunity of judging of the safety of the scaffold by seeing or observing the model. It was used by the attorneys for both the parties in examining the witnesses, and in numerous instances the witnesses answered by referring to the model and indicating parts of it, so that the answer of a witness could only be understood by one having both witnesses and model before him. The evidence was material and, for aught we can know, may have influenced, or even induced the verdict. In this state of the record we cannot say that the verdict is not supported by the evidence, or that it is manifestly contrary to the weight of the evidence. On the contrary, we must presume that it is in accordance with the evidence."

Lawrence v. Jacksonville, 167 Fla. 364, stated

the judgment of the circuit court is for our consideration.

Hendrix v. Grand Jury, 158 Fla. 434, 28 So. 2d, is a

the line effect, in which the court said in referring to some

above decisions:

"The mere, in the absence of their exhibition, with
were sufficiently numerous for a proper determination
of the cause, presumes that if they were made a part of
the record, they would show that the judge could was
justified in restraining the jurors separated from. Ibid
p. 436, 28 So. 2d, 1947 Fla. 8. Williams, 24 Fla.
Ann. 251, 1947 Fla. Ann. 8. Mathews, 24
Fla. Ann. 1947 Fla. Ann. 8. Jackson, 24 Fla. Ann.
Jacksonville v. Jackson, 8, 24 Fla. Ann.
8.

In Jackson v. Jackson, 24 Fla. 8, the court

said in referring to a view of certain premises by the jury:

"Had the jury been there as are not advised by
the record, but just presume that they saw enough,
in addition to the evidence, to justify their verdict."

In Ibid v. Jacksonville Electric Co., 167 Fla.

167, the court said:

"It is argued as error that the verdict is
contrary to the evidence also that it is unsupported
by the evidence, and the trial judge failed to
motion to set aside the verdict on grounds of error.
And, in order to see intelligently or notice
the above contention, we should have turned to the
same evidence which was before the jury. The motion
was better for jury, and that further consideration of
judge of the judge of the evidence or motion or
directing the verdict. It was used by the attorney
for each the motion to withdraw the evidence, and
in numerous instances the attorney of defen-
dant or the motion that indicated error. If, we find
no error in the motion to withdraw the evidence or
the motion to set aside the verdict and order the
same having both attorneys and judge before him. The
evidence was actually had, for every to see doing, and
from instances, or even thereof the verdict. The mile
stone of the record or manner and that the verdict is
not supported by the evidence, or that it is contrary
evidence to the weight of the evidence. The the
motion to the judge of the evidence. The the
motion, we find proper that it is in accordance with
the evidence.

There is, therefore, nothing before us for our determination. In the condition of the record we have but one function to perform and that is to affirm the judgment of the trial court, and consequently the judgment of the Circuit Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND WILSON, J. CONCUR.

234 - 31835

IN THE MATTER OF THE ESTATE OF LAWRENCE S. WILLIAMS, DECEASED, ALICE TYLER, EXECUTRIX OF THE ESTATE OF ADELINE WILLIAMS, DECEASED, Appellee,	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
v.	
ETHEL M. WILLIAMS, ADMINISTRATRIX, OF THE ESTATE OF LAWRENCE S. WILLIAMS, DECEASED, Appellant.	

Opinion filed Dec. 21, 1927.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This suit originated in the Probate Court of Cook County by Adeline Williams (now deceased) filing a claim against the estate of Lawrence S. Williams, deceased, on a certain promissory note made by Lawrence S. Williams for the sum of $1500, dated July 19, 1920, and payable 30 days after date at Chattanooga, Tennessee, with interest at 6% per annum until paid. The note was signed by Lawrence S. Williams, who wrote after his name in parenthesis "(son)", and after the name of the payee Adeline Williams was likewise written in parenthesis "(mother)".

In the Probate Court the claim was allowed for the sum of $2,000, and the defendant estate took the case to the Circuit Court of Cook County by appeal, where it was tried de novo under the statute.

There was a trial before the judge by agreement

Opinion filed Dec. 21, 1927.

ER. JUSTICE [illegible] delivered the opinion of the court:

This suit originates in the Probate Court of Cook County by Adolphus Gilliam (now deceased) filing a claim against the estate of Lawrence R. Williams, deceased, on a certain promissory note made by Lawrence R. Williams for the sum of $1,000, dated July 18, 1920, and payable 30 days after date at Manufacturers Commercial, with interest at 8% per annum until paid. The note was signed by Lawrence R. Williams, who wrote after his name in parenthesis "(seal)". and after the name of the payee Adolphus Gilliams was likewise written in parenthesis "(seal)".

In the Probate Court the claim was allowed for the sum of $1,000, and the defendant entitled took the case to the Circuit Court of Cook County by a trial, where it was tried on agreed upon the evidence.

There was a trial before the judge by agreement

and a finding in favor of the claimant in the sum of $2064, upon which finding there was a judgment against the defendant estate after the overruling of motions for a new trial and in arrest of judgment. Defendant estate brings the record to this court for review asking a reversal.

The trial in the Probate Court was had on the 13th day of February, 1926, and the claim was allowed as of Class No. 6 for $2,000 and ordered to be paid to the claimant in due course of administration.

Upon the 8th day of October, 1926, in the Circuit Court there was suggested the death of the claimant, Adeline Williams, and it was ordered that the cause proceed in the name of Alice Tyler, Executrix of the Will and Estate of Adeline Williams, deceased as claimant. The cause was tried and judgment entered in the Circuit Court on the 25th day of October, 1926.

It is argued for reversal that the trial judge erred in refusing the defendant estate leave to file upon the trial of the cause instanter an affidavit denying the execution of the note; in the exclusion of evidence challenging the genuineness of the execution of the note, and failure of claimant to prove a delivery of the note.

There were no pleadings in the case, it having originated in the Probate Court, so that the case was what the evidence made it. Even had the court erred in denying the defendant estate's motion to file a plea denying the execution of the note, it would be a sufficient answer to say, as we do, that no competent evidence was proffered to sustain such a

and - finding in favour of the claimant in the sum of $7182, plus with costs. Here was a judgment against my defendant subject to the granting of motions for a new trial and in arrest of judgment. Defendant moves brings the record to this court for review making a recount.

The trial in the Probate Court was had on the 12th day of February, 1906, and the claim was allowed in of Gross in. 3 for $8,000 and ordered to be paid to the claimant in due course of administration.

Upon the 8th day of October, 1906, in the Hamilt Court there was suggested the death of the claimant, Adeline Williams, and it was ordered that the cause proceed in the name of Alice Tyler, executrix of the will and heirs of Adeline Williams, deceased as claimant. The cause was tried and judgment entered in the Hamilt court on the 22th day of October, 1907.

It is argued for reversal that the trial judge erred in refusing the defendant entire leave to file upon the trial of the cause instanter an affidavit denying the execution of the note; in the admission of evidence modifying the genuineness of the execution of the note, and failure of claimant to make a minutes of the note.

There was no showing in the case, it being argued in the trial court, so that the case was what the evidence made it. Even had the court erred in denying the defendant counsel's motion to file a plea denying the execution of the note, it would be a sufficient answer to say, as it is, that no competent evidence was produced to sustain such a

plea if allowed.

The contention that the trial judge abused his judicial discretion in denying leave to the defendant estate to file, instanter, an affidavit denying the execution of the note, we think, is without force. The claim was allowed in the Probate Court, as above recited, and the 13th day of February, 1926, and the trial was had in the Circuit Court on October 25, 1926. The claimant died in Hamilton County, Tennessee, which was her usual place of residence, on the 2nd day of May, 1926.

It would seem apparent that the court acted with due judicial discretion when it denied the motion to file the affidavit challenging the execution of the note. The situation of the parties had been changed. If the motion had been made in apt time, it might or might not have been proper to allow it. The claimant was in life during all of the time of the pendency of the claim in the Probate Court, and within five months of the trial of the claim in the Circuit Court. If the motion had been made in apt time the claimant, even if not a competent witness herself, would have been able to advise her counsel regarding testimony supporting her contention that the note was actually delivered, although under the law such proof was not necessary with the note in the possession of the claimant. Furthermore the defendant estate made no showing why the motion had not been made at an earlier date, and the court was justified in holding that upon the trial such motion came too late. The motion should have been supported by an affidavit showing reasonable excuse for such defense not having been presented before. City of Chicago v. Cook, 304 Ill. 373.

The ruling of the court on this point was without error.

The deceased claimant had possession of the note in her lifetime, at the time of the filing of the claim and the trial of the same in the Probate Court, and her estate had possession of the note upon the trial in the Circuit Court, and produced it in evidence in the case. Neither, the execution or delivery of the note is challenged by the defendant.

In Stickel v. Neibuhr, 231 Ill. App. 606, possession was held to be sufficient, and in the Negotiable Instruments Act it is provided that "where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved."

The note being properly received in evidence established a prima facie case, which without countervailing proof entitled claimant estate to recover. Moreover, the defendant estate admitted inferentially that the note was executed and delivered because the defendant estate sought to defeat a recovery by an attempt to prove that the note was obtained by fraud and conspiracy. That was an inconsistent attitude.

The presumption that a negotiable instrument is presumed to have issued for a valuable consideration must be overcome by competent evidence. The defendant estate sought to rebut the presumption by an attempt to introduce testimony as to the statements of third parties made out of the presence of the claimant. Such evidence was clearly inadmissible. Con-

The ruling of the court on this point was without error.

The General claimant had a question of the note in his lifetime, at the time of the filing of the claim and the entry of the suit in the Probate Court, and his estate had possession of the note when the trial in the Circuit Court, and produced it in evidence in the case. Delivery, the execution or delivery of the note by decedent to the claimant.

In Gilbert v. Pelham, 121 Ill. App. 578, possession was held to be sufficient, and in the negotiable instrument Act it is provided that "where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and indefeasible delivery by him is presumed until the contrary is proved."

The note being properly received in evidence constituted a prima facie case, with nothing controverting that initial showing being in evidence. However, the defendant admits in unlisted defendants that the note was received and delivered because the defendant relies solely to defeat a recovery by an attempt to prove that the note was obtained by fraud and duressing. That was an immaterial issue.

The presumption that a negotiable instrument is presumed to have issued for a valuable consideration must be rebutted by evidence. The defendant could merely be under the presumption by introducing evidence tending to show the attachments of their proofs made out of the proceeds of the claimants. Such evidence was clearly inadmissible.

versations with the deceased claimant by third parties were claimed to have been had between 14 and 20 years before the trial, and 18 and 30 years before the date of the note in suit. Such testimony was properly excluded. Then there was an attempt to prove that the deceased defendant supported his mother, so that the inference might arise that she had no money, but the only proffered evidence supporting such contention was that deceased defendant sent to his mother, the claimant, $10 a month, and that at Christmas time and in the fall of the year, he would send her $25 to $30. This, it was claimed, occurred continuously for 10 years before Lawrence S. Williams' death. It is patent that if all the evidence proffered were true, such money was wholly inadequate to support any old lady anywhere, and in no wise tended to sustain the contention that the note was given without consideration.

There is no evidence in this record that the note in evidence was given for love and affection or on account of a filial relationship. The note not only stated on its face that it was given for value received, but Section 34 of the Negotiable Instruments Act provides that "Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration and every person whose signature appears thereon to have become a party thereto for value." Stickel v. Leibuer, supra.

There is no significance (in the absence of proof) in the words "son" and "mother" appearing in parenthesis after the names, respectively, of the maker of the note and the payee therein.

conversations with the deceased claimant by third parties were claimed to have been had between 14 and 20 years before the trial, and 12 and 20 years before the date of the note at bar. Even if they had actually occurred, they were no attempt to prove that the deceased defendant supported his mother, so that the inference might arise that she had no money, but the only positive evidence contradicting that was that the deceased defendant sent to his mother, the claimant, £10 a month, and that it Christmas time and in the fall of the year, he would send her £25 to £30. This, it was claimed, covered approximately £20 if prata extra Christmas, "Fishing" duck. It is patent that if all the evidence mentioned were true, such money was wholly inadequate to support her and her husband, and is so also tended to make plain the conversation that the note was given without consideration.

There is no evidence in this record that the note in question was given for love and affection or on account of a final reckoning. The note not only stated on its face that it was given for value received, but bearing 4% of the negotiable instruments act provides that "every negotiable instrument is deemed prima facie to have been issued for a valuable consideration and every person whose signature appears thereon to have become a party thereto for value." Chapter 1, subsection [illegible].

There is no significance (in the absence of proof) in the words "due" and "order" appearing in parenthesis after the sums, respectively, of the note and the payee thereon.

We find no evidence in this record to support the defenses of the defendant estate, and no error in the rulings of the court in the admission of evidence, and in denying the motion of the defendant estate to file an affidavit putting in issue the execution of the note in evidence.

The claimant estate contends that this appeal is prosecuted for delay, and asks for an assessment of damages, as provided in section 33 of the Act entitled "costs". We agree that there is no merit in this appeal, and conforming to said statute and the rulings thereon in Baker v. Previs, 185 Ill. 101, and Lorenz v. Jensen, 209 Ill. App. 484, we award the sum of $100 to the claimant estate as damages for the prosecution of this appeal evidently for delay only, and direct that the same be taxed as part of claimant estate's costs.

The judgment of the Circuit Court is affirmed with damages.

AFFIRMED.

TAYLOR, P.J. AND WILSON, J. CONCUR.

In fact no evil has in this regard to support the defences of the plaintiff entire, yet no error in the finding of the court in the substantial evidence, and in denying the motion of the defendant entire to file an affirmative pleading in lieu the evasion of the note in suit.

The plaintiff notes contends that this appeal is premature for delay, and made for no meritorious of counsel, as provided in section 87 of the act entitled "courts". It appears that there is no merit in this appeal, and conforming to said statute and the rulings therein in Baker v. Irwin, 188 Ill. 192, and Moore v. Jones, 208 Ill. App. 484, we award the sum of $100 to the plaintiff entire as damages for the prosecution of this appeal primarily for delay only, and direct that the same be taxed as part of plaintiff entire's costs.

The judgment of the Circuit Court is affirmed with damages.

Affirmed.

Taylor, P.J. and Fulton, J. concur.

331 - 31842

CHARLES PRIEB, Appellee, v. CRANE CO., (a corp.) Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Dec. 21, 1927.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This is an undefended appeal. The trial was before the court by agreement, and there was a finding and judgment in favor of the plaintiff for $50, and defendant is here asking a reversal.

The action is for damages arising from a collision between the Ford car of the plaintiff and the automobile truck of the defendant, which came into collision near the intersection of 44th street and Racine avenue, Chicago.

There is abundant evidence in this record to charge the defendant with the negligent act which caused the collision, and we think the judge could hardly find otherwise than he did on the question of defendant's negligence.

Complaint is made by defendant as to the probative force of the evidence regarding the damage and the repair thereof. On these questions defendant put in no counter-proof. The plaintiff himself testified regarding the damage to his car. This was supported by a witness who was a mechanic in the automobile repair business and who repaired the car. The plaintiff's testimony made out a good case for

the recovery of $74, but the learned trial judge in his wisdom reduced it to $50. This ruling was certainly generous to defendant. Defendant, we think, is unreasonable in its argument where it says: "We think this is a case where the plaintiff desired to have his old, dilapidated car put in condition at the expense of the defendant." We think this remark is somewhat in keeping with the rest of the argument. We have yet to learn that an old Henry Ford car, after being damaged in many of its parts, could be rejuvenated for $50.

We see no just reason, either in law or fact, warranting the reversal of the judgment of the Municipal Court, and it is therefore affirmed.

AFFIRMED.

TAYLOR, P.J. AND WILSON, J. CONCUR.

343 - 31854

MAE BRUDY, Appellee,	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	)	
DAVID LIPMAN, Appellant.	)	

Opinion filed Dec. 21, 1927.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This is an action upon a promissory note for $3500, dated February 2, 1925, payable on or before February 2, 1926, to the order of Mae Brudy, the plaintiff, with interest at 7% per annum after maturity.

On September 24, 1925, pursuant to notice and the regulation affidavit, the cause was placed upon the short cause calendar of the court, and set for trial on October 29th, 1926, before the trial judge in his court room in the City Hall in Chicago. On the 29th day of October, 1926, the cause was called for trial in the court of Judge Eberhardt upon the short cause calendar. The attorneys for both plaintiff and defendant were present, but the defendant was absent. His attorney made an oral motion for a continuance of the hearing upon the alleged ground that his client was absent from the city, and in support of that motion read to the court an affidavit of one Lillian Halsinger, who deposed that she was the stenographer in the office of the defendant and that she knew "that said defendant David Lipman was called to

This is an action upon a promissory note for [illegible], dated January 2, 1893, payable on or before January 2, 1896, to the order of one Doug, the plaintiff, with interest at 7% per annum after maturity.

On September 24, 1895, pursuant to notice and the regulation [illegible], the case was placed upon the short cause calendar of the court, and set for trial on October 22th, 1896, before the trial judge in his court room in the City Hall in Chicago. On the 29th day of October, 1896, the cause was called for trial in the court of judge Chandrett upon the short cause calendar. The attorneys for both plaintiff and defendant were present, but the defendant was absent. His attorney made an oral motion for a continuance of the hearing upon the alleged ground that his client was absent from the city, and in support of that motion read to the court an affidavit of one Allice Kulmayer, who deposed that she was the stenographer in the office of the defendant; that she knew that Mark Kotchnoff Hotel Lipman was called to

Evanston upon urgent business and will be forced to stay there until late this afternoon", and deposing further that when defendant returned to Chicago he must leave for Los Angeles, California, to attend to personal business. The trial judge denied the motion for a continuance and proceeded to trial, at which defendant's attorney was present. The jury was called; the note was offered in evidence without objection, and defendant's attorney failing to offer any evidence challenging the authenticity and validity of the note in any particular, thereupon the court instructed a verdict in favor of the plaintiff in the sum of $3300, which the jury returned, and after overruling defendant's motion for a new trial, judgment was entered upon the verdict, and this appeal prayed and perfected.

On the first day of November, 1936, defendant made a motion to vacate and set aside the verdict of the jury, and allow defendant time to make his defense for reasons set forth in an affidavit presented to the court in support of said motion, in which the defendant stated that on the morning of October 29, 1936, "he was necessarily engaged on business with the postmaster of Evanston, Illinois, and that he was unable to return to his office in time to appear at the trial" of the cause; and after further deposing that his defense was good and meritorious, as set forth in his affidavit of merits filed in the cause, and that the continuance was prayed on account of defendant's absence, which was not for the purpose of delay, but made wholly necessary "by the aforesaid circumstances", he set forth in the aforesaid affidavit that he was leaving the city for Los Angeles, Califor-

Tennessee Week Report Section 1a) will be forced to why there only late this afternoon, and depending further that when defendant returned to Ohio he must leave for Los Angeles, California, to attend to personal business. The trial judge denied the motion for a continuance and proceeded to trial, as well defendant's attorney was present. The jury was called; we also offered in evidence without objection, and defendant's attorney failing to offer any evidence challenging the authenticity and validity of the note in any particular, therefore the court instructed a verdict in favor of the plaintiff in the sum of $2500, which the jury returned, and after overruling defendant's motion for a new trial, judgment was entered upon the verdict, and this appeal taken and perfected.

On the first day of November, 1928, defendant made a motion to vacate and set aside the verdict of the jury, and also requested time to make his defense for reasons set forth in an affidavit presented to the court in support of said motion, in which the defendant stated that on the morning of October 29, 1928, "he was necessarily engaged on business with the proprietor of Lemaster, Illinois, and that he was unable to return to his office in time to appear at the trial" of the cause; and after further depositing that his defense was good and meritorious, as set forth in his affidavit of merits filed in the cause, and that the continuance was prayed on account of defendant's absence, which was not for the purpose of delay, but was really necessary "by the aforesaid circumstances", he set forth in the aforesaid affidavit that he was loosing his job for the duration, Difficulties

nia, at eight o'clock on Saturday, October 30th, 1926, to be gone for about two weeks; that in connection therewith he was compelled to forego attending to various matters, including the above entitled cause. He further stated in the affidavit that "a short delay will not in any way inconvenience or prejudice the rights of the plaintiff herein and respectfully prays the court to vacate the order directing a verdict for and in behalf of the plaintiff and that the defendant be given leave to present his defense at a short day."

The defendant, Lipman, who is a lawyer, wrote a letter to Judge Eberhardt on October 31, 1926, in which he stated that he was the defendant in the case of Brudy v. Lipman, and that what he was about to request was "made in the light of a litigant at bar and not as a member thereof"; that he sought only the right to be heard in open court, stating that when the case was called for trial he could not be present, "owing to absence from the city involving business with the postmaster in Evanston, Illinois, that could not, under the circumstances, be delayed without great expense, the details of which I shall be happy to explain in person." He then further states that "this case having been pending 7 or 8 months, the plaintiff cannot possibly be prejudiced or any of her rights impaired by a short continuance. From the writer's experience such continuances are rather the rule than the exception in matters called for the first time." And continuing he further says to the judge in his letter, "As I have stated I am leaving for California and expect to be gone at least two weeks, and I would rather prefer that this whole matter of my motion to vacate be continued over until I can appear and personally present my motion." But

six, at eight o'clock on Saturday, October 20th, 1906, to be open for about two weeks; that in connection therewith he was compelled to forego assenting to making matters, including the chase entitled cause. He further stated in the affidavit that "a short delay will not in any way inconvenience or prejudice the rights of the plaintiff herein and respectfully prays the court to vacate the order directing a verdict for and in behalf of the plaintiff and that the defendant be given leave to present his defense at a short day."

The defendant, Lipman, who is a lawyer, wrote a letter to Judge Grosscup on October 21, 1906, in which he stated that he was the defendant in the case of Krumb v. Lipman, and that what he was about to request was "made in the light of a libelant's bar and not as a member thereof", that he sought only the right to be heard in open court, stating that when the case was called for trial he would not be present, "owing to absence from the city involving business with the predecessor in Evanston, Illinois, that would not, under the circumstances, be delayed without prejudice, the details of which I shall be happy to explain in person." He then further stated that "this was having been pending for a month, the plaintiff means possibly to postpone or put off for slight inquired by a short continuance. The writer's experience and continuance are rather the rule than the exception in matters called for the first time." And continuing he further says to the judge in his letter, "As I have cause (on leaving for California and expect to be gone at least two weeks, and I would rather prefer that this whole matter of my motion to vacate be continued over until I can return and personally present my motion." But

the learned judge remained obdurate to this final appeal.

We think the attitude of defendant was arbitrarily unreasonable. He sought to subvert the ordinary proceeding of the court to conform to his own convenience. This attitude cannot be tolerated, for it if were, the proceedings of the court would be thrown into a chaotic condition, and the trial of causes would be indefinitely delayed at the whim and caprice of defendants to the denial of the rights under the law of plaintiffs. Furthermore defendant stated no sufficient legal reason why he was not present. What particular matters he had that were so urgent with the postmaster of Evanston he fails to state, and it was his evident intent to put the trial over until after he had gone to Los Angeles and returned to Chicago. It would seem that plaintiff was entitled to a trial at that time. As stated by the defendant the suit had been pending "7 or 8 months". It is patent from defendant's own representations in the matter that he had no reasonable excuse for being absent when the cause was called for trial.

Defendant argues in his brief that "the foundation stone upon which all jurisprudence and all judicial adjudication rests, is that every litigant shall have his 'day in Court,' that is, shall have a right to be heard before he can be bound by any judgment of the court." And in support of that statement cites Old Wayne Mut. Law Assn. v. McDonough, 204 U.S.8, in which the court said:

> "By his 'day in court' to which a party is entitled before he can be personally bound, is meant that the party shall be duly cited to appear and be afforded an opportunity to be heard."

With the statement in that citation we do not only not disagree, but recognize the statement as an axiomatic principle of law. However, defendant had all the privileges accorded by that decision. He had his day in court. He was not only summoned to appear, but he did appear and thereby made himself subject to the orders of the court, and when the court set the case for trial at a day and hour certain, it was his duty to be present or to show some good reason for his absence. He neither fulfilled the duty cast upon him by the law and the situation, nor did he give any reasonable excuse for not attending the trial. The trial judge did not abuse his judicial discretion in denying in the first instance his motion to continue and reset the case, or in later denying his motion to set aside the verdict and grant a new trial. A person has his day in court when under the law the opportunity is afforded him to either present his claim or make his defense in person in an action in which he is duly summoned. He is then in contemplation of law before the court.

The defendant was derelict in his duty in not appearing at the trial and unreasonable in his request made by his attorney without any lawful excuse that the trial should be postponed.

The trial judge with the rights of all parties in view could not have done, in the exercise of his judicial discretion, other than what he did, proceed to the trial of the cause, and to deny all the motions made for delay.

There is no reason shown why the judgment of the Municipal Court should be reversed, and accordingly it is affirmed. AFFIRMED.

TAYLOR, P.J. AND WILSON, J. CONCUR.

It is the well-known in such matters as do not only not disgrace, but recognize the abhorrent as an attorney outside of law. However, defendant had all the privileges accorded by that law. He had his day in court. He was not only summoned to appear, but he did appear and thereby made himself subject to the orders of the court, and when the court set the case for trial at a day and hour certain, it was his duty to be present or to show some good reason for his absence. He neither fulfilled the duty and took his by the law and the situation, nor did he give any reasonable excuse for not attending the trial. The trial judge did not abuse his judicial discretion in denying in the first instance his motion to continue and reset the case, or in later denying his motion to set aside the verdict and grant a new trial. A person has his day in court if he under the law the opportunity is afforded him to either present his claim or make his defense in person in a matter in which he is duly summoned. He is then in contemplation of law before the court.

The defendant was derelict in his duty in not appearing at the trial and recommended in his request made by the attorney without any lawful excuse that the trial should be postponed.

The trial judge with the rights of all parties in view could not have done, in the exercise of his judicial discretion, other than what he did, proceed to the trial at the hour, and to deny all the motions made for delay.

There is no reason shown why the judgment of the municipal court should be reversed, and accordingly it is affirmed.

AFFIRMED.

TULLY, P.J., and GILLIGAN, J., concur.

247 I.A. 615

255 - 31868

ALBERT ROSENFIELD, Appellant, v. CARL OTTENS, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Dec. 21, 1927.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This is an action brought by plaintiff, a real estate broker, against the defendant for commissions claimed as broker in the sale of defendant's property at 4147 Byron street, Chicago, which he claims to have sold as such broker for defendant to a purchaser procured by him, named Max Shapiro, for the sum of $108,000.

By the agreement of the parties the jury was waived, and the cause submitted for trial by the court. After hearing the testimony, the court found the issues against the plaintiff and in favor of the defendant, and a judgment of nil capiat was entered upon the finding, and plaintiff brings the cause here upon appeal and asks a reversal of the Municipal Court judgment.

There are two insuperable obstacles to a reversal of the judgment in this cause:

First, and of basic importance, there is no proof found in the record that defendant ever employed the plaintiff

Opinion filed Dec. 21, 1927.

to make the sale. There is no evidence that plaintiff even informed defendant, at the time he asked him if his property was for sale, that he was a real estate broker, and there was never any talk between them regarding the payment to plaintiff of a commission if he should procure a purchaser for the property.

Defendant testified that he saw plaintiff but once before the sale was made, and that he did not list his property with him, nor ask him to sell the same, and that plaintiff did not introduce the purchaser Shapiro to him. All that plaintiff testified to in this regard was that he asked plaintiff if he wanted to sell his property, and that he said "yes", and that he replied, "I have a buyer for you", and that defendant said, "all right". Defendant gave plaintiff the price of the property as $115,000. The evidence shows that the property was not sold for that sum, but for the sum of $108,000; and the testimony further shows that defendant was not present at any of the negotiations made by the plaintiff with the purchaser which resulted in the sale to Shapiro.

If it should be admitted that plaintiff was the procuring cause of the sale of the property to Shapiro, that would not be sufficient to entitle him to a commission in the absence of a contract between himself and the defendant owner of the property. As said in Morton v. Barney, 140 Ill. App.333,

> "There is no warrant for the claim that where a broker goes to an owner asking and receiving the price of a piece of property he thereby becomes the agent of the owner entitled to commissions, if the owner subsequently disposes of the property. Nor can a broker by letters of his own addressed to a possible purchaser or by writing an owner that he has offered the property to such proposed purchaser make a contract of employment for himself entitling

to make the sale. There is no evidence that plaintiff ever informed defendant, at any time he sold him it his property was for sale, that he was a real estate broker, and there was never any call between the parties for plaintiff to file of a commission if he should produce a purchaser for the property.

Defendant testified that he saw plaintiff but once before the sale was made, and that he did not talk property with him, nor ask him to sell the same, and that plaintiff did not introduce the purchaser Shelton to him. All that plaintiff testified to in this regard was that he asked plaintiff if he wanted to sell his property, and that he said "yes", and that he replied, "I have a buyer for you", and that defendant said, "all right". Defendant gave plaintiff the price of the property as $12,000. The evidence shows that the property was not sold for what was, but for the sum of $10,000; and the testimony further shows that defendant was not present at any of the negotiations made by the plaintiff with the purchaser which resulted in the sale to Shelton.

It is should be admitted that plaintiff was the procuring cause of the sale of the property to Shelton, that would not be sufficient to entitle him to a commission in the absence of a contract between himself and the defendant owner of the property. As held in Norton v. Herron, 140 Ill. App. 582,

"There is no warrant for the claim that where a broker goes to an owner seeking and receiving the price of a piece of property he already possesses the equal of the owner outlined to commissions. If the owner subsequently disposes of the property. For one a broker by letters of his own endeavored to a possible purchaser or by utilizing an owner that he has offered the property to such proposed purchaser makes a contract of employment for himself entitling

him to commissions. It takes two to make a contract of that kind, and an owner is under no obligation to respond to every letter he may receive from a real estate broker whom he has not employed."

And the Supreme Court in the case of Rees v. Spruance, 45 Ill. 308, said:

"We cannot hold that a mere proposition of this sort made upon the street in reply to a question asked by a broker about the price of a certain property understood to be for sale, amounts to an employment of the broker so as to entitled him to commissions on whatever price the property might bring. The defendant, it is true, found a purchaser through information furnished by the broker and would seem to be under a moral obligation to give him a reasonable compensation for the services thus rendered; but as he had never employed him the obligation is of that imperfect character which the law cannot enforce."

No where in this record do we find any evidence that the defendant employed the plaintiff to sell his property. Dunn v. Smith, 190 Ill. App. 530, holds to the same doctrine, supra.

It is the law that a broker who finds a purchaser ready, able and willing to buy property of an owner will be entitled to a broker's commission, if a contract of employment to make such sale is established between the broker and the owner. In all the cases to this effect, cited to us by plaintiff's counsel, the employment of the broker by the owner was either established by proof or was not in question in the case.

Second, it is admitted that there was no contract between the parties regarding brokerage fees. While several witnesses, including the plaintiff, testified in regard to payment of brokerage fees on the sale of real estate in Chicago,

such evidence was based upon personal experience of the witnesses in receiving commissions, or knowing of the payment of commissions. Plaintiff testified that from his experience the fair, reasonable value for services is 3% commission on the selling price. What was necessary to prove was the usual, customary, reasonable fees of brokers in Chicago in the sale of real estate of the character which plaintiff claims he was instrumental in selling to Max Shapiro. There is no such evidence any where in the record. The witnesses stated their opinion as to a fair and reasonable charge for selling real estate and likewise their experience in making sales of real estate, but none of the witnesses testified regarding what the reasonable, market value of such services was in Chicago.

For the foregoing reasons the judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND WILSON, J. CONCUR, BUT TAYLOR, P.J. does not concur in all the reasons set forth.

concur in all the reasons set forth.

273 - 31884

SAMUEL WHEELER, for use of Thomas A. Maguire, Appellant, v. CHICAGO TRUST COMPANY, a corporation, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Dec. 21, 1927.

MR. JUSTICE MOLDOM delivered the opinion of the court.

This is an appeal from a judgment of nil capiat and for costs against plaintiff, Samuel Wheeler, in favor of the defendant, Chicago Trust Company.

The trial was before court and jury, and at the completion of plaintiff's evidence defendant moved for an instructed verdict in its favor, which motion was allowed, and a verdict in favor of defendant was returned, upon which the court entered judgment. The court, after overruling motions for a new trial and in arrest of judgment, entered a judgment on the verdict. The plaintiff prosecutes this appeal for the use of Thomas A. Maguire, asking a reversal.

The motion for an instructed verdict was based upon two reasons, - first, that there was a variance between the averments of the declaration and the proofs given in support of it; and second, that the plaintiff represented one Harvey Nichols of Madison, Wisconsin, in the procuring for defendant of a loan upon his property there situate in the

Opinion filed Dec. 21, 1927.

Mr. Justice Hughes delivered the opinion of the court.

This is an appeal from a judgment of nil capiat and for costs against plaintiff, Samuel Wheeler, in favor of the defendant, Minneapolis Street Railway.

The trial was before court and jury, and at the conclusion of plaintiff's evidence defendant moved for an instructed verdict in its favor, which motion was allowed, and a verdict in favor of defendant was returned, upon which the court rendered judgment. The court, after overruling motions for a new trial and in arrest of judgment, entered a judgment on the verdict. The plaintiff prosecutes this appeal for the use of Thomas A. Hughes, making a recital.

The suit is for an instructed verdict was based upon two grounds, - first, that there was a variance between the averments of the declaration and the proofs given in support of it; and second, that the plaintiff represented one Harvey Rudolph of Indiana, "lessees", in the commencing for defendant of a lease upon property there situate in the

sum of $325,000, and that he secured an agreement with defendant for a secret commission, which was against Nichols' interest and without his knowledge or consent; that such agreement was against public policy and that no action could be maintained under it.

It appears from the evidence that plaintiff Wheeler had his negotiations with Hiram S. Cody, who was the manager of the real estate loan department of defendant.

We will first dispose of the question of variance.

There was a variance between the proof and the averments of the declaration. The declaration declared upon an express contract and the proofs failed to show performance thereunder. However, in making the motion the defendant failed to point out to the court in what the variance consisted, and the argument regarding variance is pointed out in defendant's brief in this court for the first time. Defendant should have pointed out specifically in the trial court in what the variance consisted and the evidence offered from which such variance arises should have been specifically objected to at the time it was offered and received. In this regard defendant failed to preserve its right to specifically point out in what the variance consisted. Therefore the motion, so far as it is based on the claimed variance, is unavailing. It might be that if defendant had pointed out the particulars on which it claimed that such variance existed, plaintiff might have been able to procure additional evidence as a curative. City of Chicago v. Wieland, 139 Ill. App. 197, where it was held that in order to preservefor review a question of variance, the

sum of $500.00, and sought to recover on statements with defendants for a secret commission, which was against stockholders' interest and without the knowledge or authority. Suit such agreement was against public policy and that no action could be maintained under it.

It appears from the evidence that plaintiff Smith had his negotiations with Adam S. Doty, who was the manager of the real estate loan department of defendant.

We will first discuss of the question of variance.

There was a variance between the proof and the averments of the declaration. The declaration declared upon an express contract and the proofs failed to show express agreement. However, in making the motion the defendant failed to point out to the court in what the variance consisted, and the appellant argument in this is polated not in defendant's brief in this court for the first time. Defendant should have pointed out specifically in the trial court in what the variance consisted and the evidence adduced from which such variance claim should have been specifically objected to at the time in the efforts and received. If this course defendant failed to preserve its right to specifically point out in what the variance consisted. Therefore the motion, so far as it is based on the claimed variance, is unavailing. It might be then it departed but points out the particulars on which it claimed that such material change. Plaintiff might have been able to produce additional evidence on a counter. Cyr of Chicago v. Whiting, 150 Ill. App. 129, where it was held that in order to constitute proper a variance of variance, the

variance must be specifically pointed out in the trial court. On failure so to do the question is not preserved for review in this court. Gascoigne v. Metropolitan, etc., 339 Ill. 18.

We now come to the question of the claimed illegality of the contract between Wheeler and the defendant made through Hiram S. Cody, the manager of its real estate department.

It is not disputed but that plaintiff Wheeler was the procuring cause of the making of the loan by defendant to his principal Harvey Nichols, and if the contract made by Wheeler with the defendant for one-half of its commission was lawful, he would then be entitled to recover the same in this action. The agreement to pay the commission was dated December 5, 1922, and is as follows:

"December 5, 1922.

To:
Mr. Samuel Wheeler,
Gotham Mortgage Company,
New York City.

Dear Mr. Wheeler:
Confirming our conversations, we will give careful consideration to applications for separate mortgages on the Harvey H. Nichols properties, known as Morris and Clifford Court, Madison, Wis., on a basis of not exceeding 50% of our appraisal of these properties, the loans to run for 15 years at 6½% interest, with payments of 3% of the principal, together with the interest, every six months, commencing Sept. 1, 1923. The fee for our service to be 5% of the Principal amount loaned.

Very truly yours,
Real Estate Loan Department,
By Hiram S. Cody,
Manager.

16 1st int. pmt. 3/1/23

Mr. Wheeler:
Your share of the commission in the above loans, if and when accepted, and at such amounts as are accepted, is to be 2½%.

H.S.C."

testimony must be specifically pointed out in the trial court. On failure so to do the question is not preserved for review in this court. Cumbiano v. Intercontinental, etc., 333 III. 16.

In our case in the question of the claimed illegality of the contract between Wheeler and the defendant made through Lynn E. Cody, the manager of its real estate department.

It is not disputed but that plaintiff Wheeler was the procuring cause of the making of the loan by defendant to his principal Harry Hobbs, and if the contract made by Wheeler with the defendant for one-half of its commission was lawful, he would then be entitled to recover the same in this action. The agreement to pay the commission was dated December 8, 1928, and is as follows:

"December 8, 1928.

To:
Mr. Samuel Wheeler,
Golden Northgate Company,
New York City.

Dear Sir, Madam:
Confirming our conversations, we will give serious consideration to placing the mortgage on the Harry E. Hobbs property, known as Joyce and Clifton Court, Hobbs, Ill., on a basis of our receiving 50% of our regularly of Chicago properties, the loans to run for 10 years at 6½% interest, w/½ payments of 2% of the principal, together with the interest, every six months, commencing Jan. 1, 1929. The fee for our service to be 2% of the principal loaned.

Very truly yours,
Hall Estate Loan Department,
By Lynn E. Cody.

Mr/ctf.

Id lnk 1st. pmt. 2%/1/29

Mr. Wheeler:
Your share of the commission in the above loan, if and when accepted, and of such amounts as are subsequent, is to be 25%.

H.E.C."

Defendant made the loan to Wheeler's principal Harvey Nichols, on the security of his Madison property in the sum of $135,000 for 15 years, and the commission charged therefor of defendant was $13,500, and Wheeler claims 2½% on the amount of the loan as his share of the commissions paid to defendant, amounting to the sum of $3350. to recover which Wheeler brought this suit.

It appears without contradiction that the plaintiff was the sole representative of Nichols in obtaining the loan for his principal. On December 29, 1922, Wheeler, from Montreal, Canada, sent a telegram to Miram S. Cody, which read, "Keep our understanding confidential. Baker and Nichols think we do not participate in commissions."

Miram S. Cody testified on the trial that the postcript to the contract regarding Wheeler's commission was made at Wheeler's request, and that it was made because Wheeler stated that he wished to show the original to Mr. Nichols, but he did not want him to know that there was an arrangement with Cody for commissions. "Therefore that was put on the carbon copy which he was to keep."

At the trial Wheeler was asked this question: "This postscript at the bottom of plaintiff's exhibit 2 which is in evidence, and which read, 'Mr. Wheeler, your share of the commission in the above loans, if and when accepted, and at such amounts as are accepted, is to be two and one-half per cent, 'and then signed underneath 'M.S.C.' who suggested that? A. Well, after he had dictated the letter, the body of the letter, I asked him to give me something in a letter showing

Defendant was in fact in Detroit's employ during January ninety, on the occasion of his broken engagement in the year of 1890, for 12 years, and the complainant charged therefor at defendant's rate $10,000, and therefore claims $12 on the account of the loss to his estate of the consolations paid to defendant, amounting in the sum of $9000, as reported claim against Detroit with interest thereon.

It appears without controversy that the plaintiff was the sole representative of Detroit in obtaining the loan for his principal. On January 22, 1893, Detroit, from Montreal, Canada, sent a telegram to James S. Cody, which read, "Can not negotiating mortgaging. Paper has already think we do not participate in commissions."

Upon S. Cody testified on the trial that the telegram to the contract regarding Detroit's commission was made on Saturday morning, and that it was made because Detroit wanted Cody's to attempt to show the original to Mr. Dunnis, for he it was very his to know that there was an arrangement with Cody for commission. "Therefore that was put on the account copy which he was to keep."

As the trial therefor was asked this questions: "This paragraph as the person of plaintiff exhibit 2 which is in evidence, did which read, 'Mr. Detroit, you share of the commission in the above loans, if and when accepted, and at such amounts as are accepted, is to be two and one-half per cent.' Did you signed telegraph to Mr. Detroit that? A. Well, after he had discussed the letter, the copy of the letter, I asked him to put on something in a letter saying

Defendant made the loan to Wheeler's principal Harvey Nichols, on the security of his Madison property in the sum of $335,000 for 15 years, and the commission charged therefor of defendant was $13,500, and Wheeler claims 2½% on the amount of the loan as his share of the commissions paid to defendant, amounting to the sum of $8450. to recover which Wheeler brought this suit.

It appears without contradiction that the plaintiff was the sole representative of Nichols in obtaining the loan for his principal. On December 29, 1933, Wheeler, from Montreal, Canada, sent a telegram to Hiram S. Cody, which read, "Keep our understanding confidential. Baker and Nichols think we do not participate in commissions."

Hiram S. Cody testified on the trial that the postcript to the contract regarding Wheeler's commission was made at Wheeler's request, and that it was made because Wheeler stated that he wished to show the original to Mr. Nichols, but he did not want him to know that there was an arrangement with Cody for commissions. "Therefore that was put on the carbon copy which he was to keep."

At the trial Wheeler was asked this question: "This postscript at the bottom of plaintiff's exhibit 3 which is in evidence, and which read, 'Mr. Wheeler, your share of the commission in the above loans, if and when accepted, and at such amounts as are accepted, is to be two and one-half per cent,' and then signed underneath 'H.S.C.' who suggested that? A. Well, after he had dictated the letter, the body of the letter, I asked him to give me something in a letter showing

Debenham was at the loss to Beveler's political survey Kimble, as the security of his Maison prospered in the sum of £200,000 for 12 years, and the consolidation charged therefor of debenture was £19,000, and Wheeler claims £40 on the account of the loss on his share of the consolidation pool to debenture, amounting to the sum of £2000. In reply also Kimble launched this suit.

It appears without contradiction that the plaintiff was the sole representative of Kimble in obtaining the loan for his principal. On January 20, 1922, Wheeler, from Montreal, Kimble, and I helped to sign a. duly, which read, "Prep. for underwriting certificates. Debt and Kimble think we do not participate in commission."

Kimble i. duly testified on the trial that he participated in the original underwriting Beveler's commission was only at Wheeler's request, and that if he made he- cause Wheeler stated that he wished to give the original to Kimble, but he did not want his to know that there was no agreement with duly the commission. "Everything that was put on the notice duly which he was to keep."

If the trial Wheeler was asked this question: "This pamphlet of the terms of plaintiff's exhibit 2 which it is admitted, and which read, 'Mr. Wheeler, your share of the commission in the above loan, if not also accepted, and at once recorded we are credited, is so the and commission pa- ment, that the signed statement 'M.S.S.' the suggested that A. Hall, after he had distributed the letter, the duly of the letter, I asked him he gave an accounting in a letter showing

what I was to get, and he asked me if I wanted that letter, and I had already explained to him that I would have gotten one-half of five per cent on a previous loan that we were talking about before I came there, and he suggested it would be better to put it in a postcript than in the letter because I might have to give the original letter to Mr. Nichols and I wouldn't have anything for myself. So then I asked him for a separate letter. And he said, no, he would put it on a postscript, and he turned to his secretary and said, 'Now, put this postscript on an additional carbon.' And he dictated that postscript."

This explanation in no wise contradicted the telegram from Montreal, or the reason which Wheeler stated to Cody, that he did not wish to have Mr. Nichols know that there was an arrangement with him for commissions.

From plaintiff's own proofs it affirmatively appears that he was sharing the commissions with defendant unknown to his principal Nichols, and in derogation of his legal duty to him. It is a well grounded principle of law that an agent must act in absolutely good faith for the benefit of the interests of his principal in all matters entrusted to his care. To secure a personal profit for himself unknown to his principal is a violation of such rule, and if he violates his trust by entering into an agreement for his own personal advantage, unknown to his principal, the law will regard such an agreement as contrary to public policy and refuse to enforce it. Wheeler, in his testimony, admitted sending the telegram from Montreal.

On cross examination Wheeler was asked this question,

what I was to get, and be urged me if I realize that letter, and I had already explained to him that I would have gotten one-half of five per cent on a premium loan that we were talking about before I came there, and it suggested it would be better to put it in a position then in the letter because I might have to give the original letter to Mr. Brooks and I already had expressed for myself. So that I asked him for a separate letter. And he said, no, he would run it on a memorandum, and he turned to his secretary and said, 'Now, put this particular on an additional memo,' and he dictated that memorandum.'

This explanation in no wise constituted the taking from Longnecker, or the person with whom Mr. Brooks talked to look, that he did not wish to have Mr. Brooks know that there was an arrangement in his for commissions.

From plaintiff's own mouth it affirmatively appears that he was making the commissions with defendant unknown to his principal Brooks, and in derogation of his legal duty to him. It is a well grounded principle of law that an agent must act in absolutely good faith for the benefit of the interests of his principal in all matters entrusted to his care. In essence a personal profit for himself unknown to his principal is a violation of such duty, and if in violation his trust by entering into an agreement for his own personal interests, unknown to his principal, he will be held accountable to his principal for such profit, and the law will regard such an agreement as contrary to public policy and refuse to enforce it. Whether, in his testimony, defendant answer the allegations from Brooks.

In same examination Reuler was asked this question,

"Q. Why didn't you want Mr. Nichols to know you were going to get two and a half per cent of this five per cent? A. Well, I - I was under the impression that he didn't think my participation in the original loan would be as much as half for placing it. And I - I really felt that Mr. Nichols needed this loan to get himself out of a hole on his building operation. And he might start to ask me for a portion of it, and I felt that I earned the two and a half, and I did not want to make any deductions out of it."

It is therefore clear that Wheeler intentionally kept the knowledge of his arrangement with defendant regarding commissions from Nichols, and further that he did not wish him to know anything about his participation in the commission paid to defendant. If Wheeler had told Nichols regarding his contract for commission and had collected the same with Nichols' consent, a different question would be presented. The virus of the whole matter is that the bargain for the commission was secretly and designedly kept from the knowledge of Nichols whom the law bound him to serve faithfully.

In Estate of Smythe v. Evans, 209 Ill. 376, it was held that a contract made by an agent of a corporation under which the interests of the agent are adverse to those of the corporation, was against public policy, and cannot be enforced against the other party without proof that the corporation, by its directors, either expressly consented to the agent's act or expressly ratified it with full knowledge of the material facts. And the court will refuse to aid either party to enforce a contract against public policy, and such

"Q. You didn't you ever at, Honors to Lamo are were pais to put two and a half per cent of this five per cent? A. Well, I - I was under the impression that he didn't think my participation in the original loan would be as much as half for placing it. And I - I really felt that or, Alonzo needed this loan to put himself out of a hole on his building operation. And he didn't start to sell me for a portion of it, and I felt that I earned the two and a half, and I did not want to make any modifications out of it."

It is therefore clear that Shealer intentionally kept the knowledge of his arrangement with defendant regarding commissions from Alonzo, and further that he did not wish him to know anything about his participation in the commission paid to defendant. If Shealer had told Alonzo regarding his payment for commission not had collected the same with Alonzo's money, a different question would be presented. The view of the whole matter is that the bargain for the commission was necessarily and deliberately kept from the knowledge of Alonzo who has law bound him to serve faithfully.

In Lewis v. Lewis, 300 Ky. 872, 378, it was held that a contract made by an agent of a corporation under which the interests of the agent are diverse to those of the corporation, was against public policy, and cannot be enforced against the other party without proof that the corporation, by its directors, either expressly consented to the agent's act or ratifying it with full knowledge of the material facts. And the court will refuse to aid either party to enforce a contract against public policy, and such

action of the court is not for the preservation of the rights of either party, but for the maintenance of the dignity of the court, public good and the laws of the state. Nilson Mch. Co. v. Kurtz Action Co., 196 Ill. App. 424.

The evidence of plaintiff established the fact that the contract which Wheeler seeks to enforce against the defendant was for a secret commission against the interest and without the knowledge of his principal Nichols. That was a question of law for the court, and his decision that such contract was contrary to public policy and unenforcible in a court of law was right. Aside from the question of variance, in which the Court's ruling was erroneous, as a matter of law, the claim was unenforcible.

There is no reversible error in this record. Therefore the judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND WILSON, J. CONCUR.

199 - 31810

EDWIN J. ROOS, Appellee, v. WISCONSIN LIME & CEMENT CO., a corporation, and FREEMAN LANDON, doing business as LANDON CARTAGE CO., ON APPEAL OF FREEMAN LANDON, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

Opinion filed Dec. 21, 1927.

MR. JUSTICE WILSON delivered the opinion of the court.

From the testimony in this case it appears that about six o'clock on the evening of December 5, 1924, Edwin J. Roos, plaintiff below and appellee here, was driving a Ford sedan southeasterly on Norwood Park Avenue in the city of Chicago. It also appears that ahead of the plaintiff was a certain horse driven wagon owned and operated by the defendant Wisconsin Lime & Cement Co., which was proceeding in a southeasterly direction, and in the same direction in which the plaintiff was proceeding in his Ford sedan. It appears further that the defendant, Freeman Landon, doing business as the Landon Cartage Company defendant herein, at the same time was operating a motor driven truck, and thetestimony discloses that this truck was being operated in a southeasterly direction on Norwood Park Avenue and in the rear and back of the Ford sedan of the plaintiff. The evidence discloses that

Opinion filed Dec. 21, 1927.

MR. JUSTICE [illegible] delivered the opinion of the court.

From the testimony in this case it appears that about six o'clock on the evening of December 8, 1924, Edwin J. Ross, plaintiff below and appellee here, was driving a Ford sedan northwestwardly on Kedzie avenue in the City of Chicago. It also appears that ahead of the plaintiff was a motor truck driven under and by servants of the defendant Chemical Line & Sweet Co., which was proceeding in a southwestwardly direction, and in the same direction in which the plaintiff was proceeding in his Ford sedan. It appears further that the defendant, Fremont Lawson, being business as the Lawson Service Station [illegible], at 801 Kedzie was operating a motor driven truck, and testimony disclosed that this truck was being operated in a northwestwardly direction on Kedzie avenue and in the same and same of the left side of the plaintiff. The testimony discloses that

there was considerable traffic proceeding in both directions over and along this street at the time in question, and that just before the accident happened there was another car in front of the Ford, between it and the horse driven wagon, which car turned out to the left and passed the wagon of the defendant Wisconsin Lime & Cement Co. According to the testimony of the plaintiff, a bus, with glaring headlights, approaching from the southeast, blinded the plaintiff and as a result his Ford sedan ran into the rear end of the wagon operated by one of the defendants herein, and thereupon plaintiff got out of his car; ran after the driver of the wagon, and the two walked back to inspect the injury to the Ford. While they were standing near the Ford inspecting it, the truck operated by the defendant Landon ran into the Ford, threw it up over a six inch curb, skidded a sufficient distance further to strike the horse driven vehicle, which was approximately 40 feet ahead of the rear end of the Ford, and then ran up over the curb into a parkway and stopped against a willow tree. The evidence shows that it had been a drizzly, rainy day, and at the time of the accident in question it was dark; - it was apparently about one half hour after sunset. The street lights had been lighted and one of these lights was almost opposite the place where the collision in question occurred. The declaration in the cause was somewhat loosely drawn and several questions were raised by the defendant Landon, to the effect that under defendant's motion in arrest of judgment a new trial should have been granted, as none of the counts of the declaration were sufficient to support the verdict. For the purpose of this discussion it will not be necessary

to set out the declaration in full nor refer to it other than as it affects the defendant Landon.

The first count charges that the Wisconsin Lime & Cement Co. was operating a wagon in a southeasterly direction in Norwood Park Avenue, and that at the time aforesaid, the plaintiff was riding in a certain automobile then being operated in a southeasterly direction, and at the time was in the exercise of ordinary care for his own safety. It further charges that the defendant Landon so carelessly and negligently managed, operated and controlled his motor vehicle that the same ran into and collided with the automobile of the plaintiff. The second count charges the defendant Landon with operating his motor vehicle at a high and dangerous rate of speed, so that by reason thereof he ran into and collided with the automobile of the plaintiff. The third count charges violation of Ordinance 4016 of the Chicago Municipal Code, which provides that white and red lights shall be displayed during the period from sunset to one hour before sunrise; and that every motor vehicle shall carry two white lights visible at least 300 feet in the direction in which it is proceeding. It also charges that the defendant Landon failed to maintain any white lights visible in the direction he was proceeding, in conformity to the City Ordinance. Each count coupled personal property damage, by reason of damage to the Ford car, with the personal injury damage sustained by the plaintiff. To These three counts the defendant Landon pleaded the general issue, and also filed a special plea to the effect that the plaintiff,

to act out the dramatization in full now refer to it rather than as it alleges the defendant became.

The first count charges that the plaintiff James Co. was operating a wagon in a northwesterly direction in Norwood Park Avenue, and that at the time aforesaid the plaintiff was riding in a certain automobile then being operated in a southeasterly direction, and at the time was in the exercise of ordinary care for his own safety. It further charges that the defendant Jordan so carelessly and negligently managed, operated and controlled his motor vehicle that the same ran into and collided with the automobile of the plaintiff. The second count charges the defendant Jordan with operating his motor vehicle at a high and dangerous rate of speed, so that by reason thereof he ran into and collided with the automobile of the plaintiff. The third count charges violation of Ordinance 4223 of the Village Municipal Code, which provides that white and red lights shall be displayed during the period from sunset to one hour before sunrise; and that every motor vehicle shall carry two white lights visible at least 500 feet in the direction in which it is proceeding. It also charges that the defendant Jordan failed to maintain any white lights visible in the direction he was proceeding, in contravention to the city ordinance. Each count contains personal property damage, by reason of damage to the ford car, with the personal injury damage sustained by the plaintiff. To these three counts the defendant Jordan pleaded the general issue, and also filed a special plea to the effect that the plaintiff,

at the time of the accident, was employed by the Robinson Furnace Company as a laborer or chauffeur, and was, therefore, covered by the Workmen's Compensation Act of the State of Illinois, and had not elected not to receive compensation, as provided by the Act, and was bound by the provisions of that Act; and that he did not file a notice with the Industrial Commission of Illinois, of his intention not to be so bound, and that, therefore, he is not entitled to maintain his suit. To this special plea, plaintiff filed a replication denying it generally, and further setting out that at the time of the injury in question he was not engaged in the course of his employment.

The cause was submitted to a jury and a verdict was returned, finding the defendant Landon guilty and assessing the plaintiff's damages at the sum of $3,500.00. Judgment was entered on the verdict, and a further judgment was entered by the court, dismissing the Wisconsin Lime & Cement Co., with judgment for its costs.

The defendant Landon, by his counsel, asks to have this judgment reversed, and for reason therefor, relies upon several points which we will consider in the order in which they are raised. It is first insisted that on the motion in arrest of judgment the court should have granted a new trial because of the fact that the declaration was defective, in that it contained no allegation that the plaintiff at the time in question was in the exercise of due care for his own safety. The point of law is well settled that before a plaintiff can recover he must allege and prove that at the

time in question he was in the exercise of due care and caution for his own safety; and on a demurrer to such a declaration it is evident that without such an allegation the declaration would be held bad. There seems to be, however, a different rule where such a motion is made after verdict. The first count of the declaration inartificially charges that the plaintiff at the time aforesaid was in the exercise of ordinary care for his own safety, but the "time aforesaid," appears to have referred to the time that the defendant Wisconsin Lime & Cement Co. was operating its wagon in a southwesterly direction. There is no allegation of due care in the other two counts. The first count, however, is a charge of general negligence; and after verdict, the courts are much more liberal in applying every intendment in favor of the pleader. Pennsylvania Company v. Elliott, 132 Ill. 654; Gerke v. Fancher, 57 Ill. App. 651. A motion based upon refusal of a trial court to grant a motion in arrest of judgment, only raises matters of record and not of evidence, so that in considering the question here, as to the declaration, this court is compelled to assume that the facts in evidence sufficiently showed that the plaintiff was in the exercise of ordinary care for his own safety, and there is nothing in the declaration which discloses that he was not in the exercise of ordinary care for his own safety. In other words, while it is a necessary allegation in a pleading before a verdict, it is a statement of a negative, and unless it appears from the evidence that the plaintiff was not in the exercise of ordinary care, the verdict will not be disturbed on a motion in arrest of judgment, because under a motion in arrest of judgment the court must presume that the

evidence failed to show any want of due care on the part of the plaintiff. Moreover, the court instructed the jury, at the request of the defendant, that the burden was upon the plaintiff to show that he was in the exercise of ordinary care and caution for his own safety, and that the jury had no right to disregard this rule nor adopt any other, but should adhere strictly to it. A declaration is not allowed to go to the jury, so that the pleadings were not before it as a question of fact, but it appears that the jury was expressly instructed as to the responsibility resting upon the plaintiff with regard to the care he, himself, was required to exercise. The declaration may have been subject to demurrer in that it was defectively stated, but it did not state a defective cause of action, and we are, therefore, of the opinion that the court ruled properly in overruling the motion in arrest of judgment, for the reasons stated. Foster v. Shepherd, 164 Ill. App. 198; Franklin Printing Company v. Behrens, 181 Ill. 340.

The second proposition advanced by the defendant Landon, is that his motion for a directed verdict should have been sustained. As we view the evidence it would appear that the truck was proceeding at such a rate of speed that after striking the Ford it proceeded a considerable distance up over a curbstone, and up against a tree, from which it is fair to infer that the speed at which it was being operated was greater than it should have been, keeping in mind the fact that there was considerable travel upon the street, and that the pavement was wet and liable to cause skidding of cars which were not completely under control. All the facts were before the jury

evidence failed to show any weak or due care on the part of the plaintiff. Further, the court instructed the jury, at the request of the defendant, that the burden was upon the plaintiff to show that he was in the exercise of ordinary care and caution for his own safety, and that the jury had no right to disregard this rule for any reason or other, but should adhere strictly to it. A declaration is not dismissed to go to the jury, so that the challenge was not before it as a question of fact, but it appears that the jury was expressly instructed as to the responsibility resting upon the plaintiff with regard to the main key himself, was required to exercise care. The declaration may have been subject to demurrer in that it was defectively stated, but it did not state a defective cause of action, and we are, therefore, of the opinion that most the jury right, in overruling the motion in arrest of judgment. For the reasons stated, Kanion v. Shepherd, 104 Ill. App. 398; Chicago Traction Company v. Anderson, 181 Ill. 540.

The second proposition advanced by the defendant counsel, is that his motion for a directed verdict should have been sustained. In no view the evidence it would appear that the jury was justifying in such a note of error that after sliding, it-a foot it increased a considerable distance up over a surface, and to equalize a tree, from which it is fair to infer that the speed at which it was being operated was greater than it should have been. Bearing in mind the fact that there was considerable travel upon the street, and that the pressure was very and liable to cause sliding of note which were not necessarily under control. All the facts were before the jury

and we believe that the trial court properly refused on the facts to direct a verdict. The driver of the truck testified that he saw headlights ahead of him; that they disappeared and he believed that the machine ahead of him had turned in at some other street or into some entrance along the street. The witnesses on behalf of the plaintiff testified that the Ford was moved over to the curb with its two right wheels touching the curb, which would place it in a position with its rear light toward the north west; and that the lights of the Ford sedan were burning at the time in question. It was purely a question of fact for the jury and this court has no reason to disturb that finding.

It is argued also that certain evidence given by a witness on behalf of the plaintiff, to the effect that four days after the accident he examined the Ford and the lights were in working condition, was error as it was too remote and not a part of the res gestae. We do not think the court erred in permitting this testimony to go in, not as a part of the res gestae but as bearing on a question of fact, the weight of which was for the jury to consider.

Our attention is called to two instructions which were given by the court and which it is claimed were erroneous. These instructions are referred to as instructions 10 and 13. We believe there was no error in the giving of instruction 10, which was based upon the City Ordinance requiring lights which are visible for 300 feet. Plaintiff had a right to have his cause presented upon his theory of the case, which was that while it was dark and after sunset, the ordinance required lights of

and so believe that the trial court improperly refused on the facts to direct a verdict. The driver of the truck testified that in the moonlight viewed at dusk they discovered and he believed that the weather cleared of his and turned in at some fifty feet or less before reaching the crossing.

The witnesses on behalf of the plaintiff testified that the lead car moved over to the turn with its two right wheels bumping the curb, which would place it in a position with its rear light toward the north-west, and that the lights of the lead motor were burning at the time in question. It was purely a question of fact for the jury and this court has no reason to disturb that finding.

It is argued also that certain evidence given by a witness on behalf of the plaintiff, to the effect that four days after the accident he examined the lead and the lights were in working condition, was error as it was too remote and not a part of the res gestae. We do not think the court erred in permitting this testimony to go in, not as a part of the res gestae but as bearing on a condition of fact, the weight of which was for the jury to consider.

Our attention is called to two instructions which were given by the court and which it is claimed were erroneous. These instructions are returned to as instructions 16 and 18. We believe there was no error in the giving of instruction 16, which was based upon the 6th. Statutory requiring lights which are visible for 500 feet. Plaintiff had a right to have his cause presented upon his theory of the case, which was that while it was dark and after sunset, the ordinance required lights of

certain specifications, visible at a particular distance, and there is no testimony in the record from which this court would have to say, as a matter of law, because of weather conditions, that it was impossible to see lights at that distance if they had been on the truck of the defendant Landon and lighted at the time.

We find that there was no error in the giving of Instruction 12, nor that the defendant Landon was injured by the giving of this instruction. The facts show that as a result of the accident plaintiff's Ford sedan was badly damaged and the plaintiff sustained a severe injury, which appears to be permanent and which has materially interferred with the use of his left arm. The injury consisted of a dislocated shoulder blade and collar bone, resulting in a flat joint. The end of the collar bone appears to be held in place by a ligament, holding it to the acromion process. In the event this ligament should be torn this bone would snap out of place. We cannot say that the damages assessed by the jury are so excessive as to shock the conscience of the court. We are of the opinion, moreover, that the court held correctly in sustaining the objection to certain questions asked the plaintiff in regard to his having filed a notice with the Industrial Board. It was not proper cross-examination, because the witness had been asked nothing about it on direct. It was purely a matter of proof under the defendant's plea. When it became necessary for the defendant to introduce evidence under this plea, it would have been proper for him to have called and interrogated the plaintiff if he so desired.

For the reasons stated in this opinion, the judgment of the Superior Court will be affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND HOLDEN, J. CONCUR.

212 - 31823

HELEN WILMES, Administratrix of the Estate of JOHN G. WILMES, DECEASED, Appellant,	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
v.	
JANE CARLTON, Appellee.	

Opinion filed Dec. 21, 1927.

MR. JUSTICE WILSON delivered the opinion of the court.

This is an action upon two promissory notes duly executed, signed and delivered by John G. Wilmes. The notes are for $2,000 and $3,000, dated July 15, 1923, and October 1, 1923, respectively, with interest at six per cent after date, each note maturing six months after date and each note payable to Jane Carlton, claimant.

Wilmes died in New Mexico November 6, 1923, as a result of tubercular trouble from which he had suffered for about a year previous to his death. A claim for the amount of the notes, with interest, was presented to the Probate Court of Cook County by claimant. On a hearing before the Circuit Court of Cook County, on appeal from the Probate Court, a jury being waived, a finding and judgment was entered in favor of the plaintiff for the amount of $5,931.15. From this judgment the estate has perfected this appeal.

This being an appeal from the Probate Court to the Circuit Court, it necessarily follows that there were no pleadings, and it appears to have been understood that

the only defense offered on behalf of the estate was that there was no consideration for the notes. On behalf of the claimant, the two notes were introduced in evidence and the claimant thereupon rested. Testimony was introduced on behalf of the estate, to the effect that claimant occupied a room adjoining that of John G. Wilmes, the decedent, for several years prior to his death; that there was an illicit relationship existing between them; and that she had at no time paid rent for the room, but that expense had been borne by Wilmes, and that he had frequently advanced money to her. Certain letters were introduced by both parties, showing the relationship and also referring, from time to time, to money matters and accounts existing between them. The bank account of the claimant was introduced in evidence, and it is argued from this that it shows no loans to that amount to the decedent on or about the dates of the notes in question. On the other hand, it is argued by counsel for the claimant that this account at times carried as much as four or five thousand dollars; that the consideration for the notes may have been in cash and not by check and that the size of the account indicated her ability to make the loan.

There is only one question involved in the case and that is whether or not there is any evidence to support the verdict. It is not the duty of this court, on appeal to weigh that testimony. The introduction of the notes in evidence, in cases of this character, makes out a prima facie case; and the presumption is that the consideration named in the notes was a good and valuable consideration and was given at the time of the making and execution of the notes.

the only defense offered on behalf of the estate was that there was no consideration for the notes. On behalf of the claimant, the two notes were introduced in evidence and the claimant thereupon rested. Testimony was introduced on behalf of the estate, to the effect that claimant executed a room adjoining that of Mrs. G. Hines, the decedent, for several years prior to the death that there was an illicit relationship existing between them; and that she had at no time paid rent for the room, but that expenses had been borne by Hines, and that he had frequently advanced money to her. Certain letters were introduced by both parties, showing the relationship and the relations they sustained to him, in many respects not consistent with existing between them. The best evidence of the claimant was introduced in evidence, and it is urged from this that it alone is issue to that subject to the decedent on or about the date of the notes in question. On the other hand, it is urged by counsel for the claimant that this account at times matter, be such as just or fair thereunto ability; that the consideration for the notes may have been in cash and not by check and that the name of the account indicated her ability to make the loan.

There is only one question involved in the case and that is whether or not there is any evidence to support the verdict. It is not the duty of this court, on appeal to weigh that testimony. The introduction of the notes in evidence, in spite of the claimant, were not a prima facie case; but the consideration in that the consideration moved to the estate was a good and valuable consideration and was given at the time of the making and execution of the notes.

Stickel v. Heibuhr, 321 Ill. App. 606. The burden of rebutting this presumption rests upon the estate, and it is its duty to overcome this by a preponderance of the evidence. Chicago Title & Trust Co. v. Ward, 115 Ill. App. 327; Richardson v. Richardson, 148 Ill. 563. It is argued by counsel for the estate that the relationship existing between the parties, as shown by the testimony, created a fiduciary relationship, and that as a result thereof the natural suspicion thrown around the transaction would be sufficient to shift theburden of proof to the claimant. With this contention we are unable to agree. Counsel cite numerous will cases. It is true that in the contests of wills, testimony as to such relationship is competent, together with other evidence, as bearing upon the question of undue influence, if any, which might be exerted in the procuring of the making of the will. But the circumstances of this relationship, standing alone, are not sufficient to overcome the presumption in favor of the legality of the note and the consideration stated therein. As we have stated, it is not the province of this court to weigh the testimony, and as there is no error of record in the trial of the cause, the question for this court is only as to whether there is any evidence to support the finding of the trial court. This court is of the opinion that there is testimony upon which such claim should be allowed.

For the reasons stated in this opinion, the judgment of the Circuit Court will be affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

225 - 31836

247 I.A. 616[4]

T. W. CHAMPION REALTY AGENCY AND LOAN COMPANY, a corp.,

Appellee,

v.

S. A. T. WATKINS,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Dec. 21, 1927.

MR. JUSTICE WILSON delivered the opinion of the court.

The facts in this case show that the plaintiff below, T. W. Champion Realty Agency and Loan Company, filed its statement of claim in the Municipal Court of Chicago, in which it set up that it had procured a purchaser for certain real estate belonging to the defendant, S. A. T. Watkins, for the price of $13,500, and that it became entitled to its commission of three per cent, upon producing a purchaser who was ready, willing and able to purchase said real estate; that it did produce such a purchaser, but that said defendant failed to proceed with the deal and refused to pay the commission. The defendant denies that the plaintiff produced a purchaser who was ready, willing and able to purchase his property, and that if it did so, it was without authority, and that the party the plaintiff produced was not ready, willing and able to purchase the property and did not carry out the terms of the agreement.

Upon a trial before a jury there was a verdict in

favor of the plaintiff, and judgment was entered upon that verdict. The case comes before this court for decision, upon appeal.

The testimony shows that one T. W. Champion, who appears to be the president and treasurer of the T. W. Champion Realty Agency and Loan Company, saw the defendant at 3712 Grand Boulevard, in the City of Chicago, and had a conversation with him with reference to the sale of that property; that as a result of his efforts a written contract was entered into between one Georgia Ingram and Samuel A. T. Watkins, defendant herein, which contract provided that the said Georgia Ingram was to purchase for $12,500 the premises commonly known as 3712 Grand Boulevard; and that the said Samuel A. T. Watkins agreed to sell said premises, at said price, and to convey a good and merchantable title thereto, subject to a first mortgage of $5,000; that the purchaser had paid $500.00 as earnest money, and would pay $750.00 when a general warranty deed was ready for delivery. The contract contained certain other provisions in regard to furnishing abstract of title, and to perform within a certain time; and to leave the contract and earnest money with the plaintiff.

We have carefully read the testimony in the cause and come to the conclusion that such a contract was entered into, and that it was brought about through the efforts of the plaintiff; and that the plaintiff had fully performed the services required of it as a broker and it was, therefore, entitled to its commission. There is no force in the proposition advanced by the defendant, that the claim was upon a

favor of the plaintiff, and judgment was entered upon that verdict. The most novel point in this case for decision, was manifest.

The testimony shows that one T. R. Crandall, who appears to be the president and treasurer of the T. R. Crandall Realty Agency and Loan Company, was the defendant in Civil Court Contested, in the city of Chicago, and had a conversation with his wife relative to the sale of that property; that as a result of his efforts a written agreement was entered into between the Realty Agency and Samuel A. T. Rankin, defendant herein, which contract provided that the sale should figure was to be payable for (?), the purchaser personally owed an $1112 Bond mortgage and that the paid Samuel A. T. Rankin agreed to sell said property, at said price, and to convey a good and merchantable title thereto, subject to a first mortgage of (?), that the purchaser had paid (?) on account money, and would pay (?) when a general warranty deed was ready for delivery. The contract contained certain other provisions in regard to furnishing abstract of title, and to perform within a certain time; and to leave the commission and earnest money with the plaintiff.

It has been carefully said the testimony in the case and come to the conclusion that you a contract was entered into, and that it was brought about through the efforts of the plaintiff; and that the plaintiff had fully performed the services required of it on a broker and it was, therefore, entitled to its commission. There is no force in the new position assumed by the defendant, that the title was not a good

written instrument and that it should have been set out in the statement of claim, because, as a matter of fact, the claim was not upon a written instrument. The trial court correctly held that the written instrument was only evidence of the oral understanding between the parties, as it was not a contract between the parties to the suit. The courts of this state have held repeatedly that where a broker has produced a purchaser who is ready, willing and able to purchase, he has performed his full duty and his right to a commission will not be defeated because of a defect in the title of the owner or because of the refusal of a wife to join in the contract; nor is he required to show that the purchaser was ready, willing and able to perform, after the owner has entered into a written contract with the purchaser. Kushkiewicz v. St. George, 226 Ill. App. 310; Wilson v. Mason, 158 Ill. 304.

In the case at bar the seller, for his own protection, required the making of a deposit by the prospective purchaser, of $500.00 earnest money, and this deposit was made, and it sufficiently indicates that the purchaser was ready, willing and able to perform; and moreover, the owner had protected himself against loss in the event the purchaser was not ready, willing and able to perform.

It is argued to some extent by defendant that the trial court erred in not admitting in evidence a quit claim deed from the prospective purchaser to the owner of the premises in question, after the contract had been entered into.

written instrument has been at absolute zero been not one in the statement of claim, however, as a matter of fact, the claim was not upon a written instrument. The trial court correctly held that the written instrument was only evidence of the equal understanding between the parties, as it was not a contract between the parties to the suit. The courts of this state have held repeatedly that where a broker has produced a purchaser who is ready, willing and able to purchase, he has performed his full duty and his right to a commission will not be defeated because of a defect in the title of the vendor or because of the refusal of a wife to join in the conveyance. He is required to show that the purchaser was ready, willing and able to perform, after he has made his contract contained with the purchaser. Smallwood v. Jordan, 104 Ill. App. 630; Wilson v. Martin, 180 Ill. 274.

In the case at bar the evidence, for his own protection, required the making of a memo by the prospective purchaser, of $500.00 earnest money, and this deposit was made, and it satisfactorily indicates that the purchaser was ready, willing and able to perform; and moreover, the owner has practically admitted liable in the event the purchaser was ready, willing and able to perform.

It is argued on some points by defendant that he (appellee) erred in not contending in evidence a cash claim from the conspective purchaser on the owner of the premises in question, after the contract had been entered into.

We are unable to see how this casts any light upon the question as to whether or not the plaintiff had earned its brokerage commission. If the parties to the contract decided to abrogate it and not to proceed thereunder, they had a right to do so, and the issuance of the quit claim deed would clear the title and remove any cloud there may have been against the premises by reason of the recording of the agreement. It would not, however, defeat the claim for commission already earned.

Some point is made upon the proposition that the plaintiff, being a corporation, could not act as a broker. This question was not raised by the affidavit of defense and we are not called upon to pass on it. We find nothing whatever in the evidence moreover, from which we could hold that it was not properly authorized so to act.

For the reasons stated, in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

246 - 31857

247 A 616

ANTON Z. MICHULIS, Appellee, v. PETE NIMCHOSKI and MIKALINA NIMCHOSKI, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Dec. 21, 1927.

MR. JUSTICE WILSON delivered the opinion of the court.

This is an action for a real estate broker's commission. The statement of claim charges that the defendants are indebted to the plaintiff in the sum of $300.00 for services rendered to them at their request; and is based on an agreement whereby defendants agreed to pay him the aforesaid sum if he found them a purchaser who was ready, willing and able to purchase the property owned by the defendants. The statement further charges that the plaintiff procured a purchaser, and that a written contract dated June 10, 1926, was entered into by the parties; and that, thereby, the defendants became indebted to plaintiff for his commission, which they refused to pay.

On the trial of the case, the plaintiff introduced in evidence a certain agreement, in writing, signed by Joseph Zakauskas and Anthony Wukstella, parties of the first part, and defendants herein, parties of the second part. The contract among other things contained the following provision: "It is further mutually agreed, that brokerage fees or com-

Opinion filed Dec. 21, 1927.

MR. JUSTICE [illegible] delivered the opinion of the court.

This is an action for a real estate brokerage commission. The statement of claim charges that the defendants are indebted to the plaintiff in the sum of [illegible] for services rendered to them at their request; and is based on an alleged oral contract between the parties. The defendants deny that it is true that they ever entered into any such contract, willing and able to undertake the property owned by the defendants. The statement further charges that the plaintiff procured a purchaser, and that a written contract dated June [illegible], 1926, was entered into by the parties; and that, thereby, the defendants became indebted to plaintiff for his commission, which they refused to pay.

In the trial of the case, the plaintiff introduced in evidence a written agreement, in writing, signed by Joseph Schmuhen and Anthony Sabatino, parties of the first part, and Clemente Davis, parties of the second part. The agreement stated that the parties "have this day made the following contract:

"It is hereby mutually agreed, that whichever one of the

missions shall be paid to Anton S. Michulis $400 by the first parties and $300 from second parties hereto as heretofore agreed between them and said broker."

Plaintiff testified on his own behalf that he was the Michulis named in the contract, and that they agreed to pay him $300.00 commission. Plaintiff rested and thereupon defendants undertook to cross-examine him concerning a certain conversation had with the defendants at the time they agreed to engage his services as a broker, in and about the sale of the property in question; evidently for the purpose of showing that there was some other and different arrangement between them, with regard to the commission, than that stated in the written contract hereinbefore referred to. To all of this line of questions the court sustained objections, on the ground that the parties could not vary the terms of a written instrument by parol. In this ruling the court was in error. The contract in question was not a contract between the plaintiff and defendants. The suit in question is based upon an entirely different contract, namely, one between the broker and the owners of the property, - defendants herein; and any competent testimony was admissible in regard to what was said and done at the time of the entering into that agreement. The contract in question, being a contract between the purchasers and the sellers, was not binding as between the parties to this suit; and while it was admissible in evidence, for the purpose of showing the consummation of the contract, and as bearing upon the question of the commission that was due the plaintiff, if any, nevertheless, it was not subject to the rule of evidence that a written

contract could not be varied by parol, as it was not a suit between the parties to that agreement. This court is of the opinion that the trial court erred in not permitting the cross-examination of the witness, by defendants' counsel, for the purpose of showing what the facts were concerning and surrounding the making of the contract between the parties to this suit. Defendants by their counsel offered to make certain proof as to what was said and done by the parties at the time the contract with the broker was entered into, on the question as to the amount of his commission. Objections were sustained to all of this line of testimony, for the same reason hereinbefore referred to in this opinion. In this the trial court erred.

For the reasons stated, the judgment of the Municipal Court will be reversed and the cause remanded to that court for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED FOR A NEW TRIAL.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

247 I.A. 617

367 - 31878

MARY KENNEDY, Appellee, v. JOSEPHINE G. LaMELE, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Dec. 21, 1927.

MR. JUSTICE WILSON delivered the opinion of the court.

This is an appeal from the Municipal Court of Chicago from a finding by that court, overruling a motion to vacate a judgment entered by confession on a lease. The lease was dated May 1, 1925, and was between Mary Kennedy, plaintiff below, and Josephine G. LaMele, defendant below, and under the terms of the lease it expired the 30th day of April, 1927. The leased premises consisted of a flat at 846 Waveland Avenue, which was to be occupied as a dwelling place and not otherwise. The lessee agreed to pay the sum of $2400, payable in monthly installments of $100 each in advance upon the first day of each and every month of the term of the lease. The lease contained the usual and customary power to confess judgment, in the event of the failure of the lessee to pay the rent, as provided therein. It was further provided in said lease as follows:

> "It is further agreed, by the parties hereto, that after service of notice, or the commencement of a suit, or after final judgment for possession of said premises, the first party may receive and collect any rent due, and the payment of said rent shall not waive or affect said notice, said suit or said judgment."

Opinion filed Dec. 21, 1927.

The judgment by the court was for $126.68, and was for the rent for the month of September and the first and second days of October, 1926, during which time the defendant below was in actual occupation and possession of the premises. The facts further disclose that the notice in the forcible entry and detainer suit was served on September 7 of that year and the judgment of restitution was entered on September 23. The judgment on the lease, for rent, was entered October 19, of that year and an execution issued thereon; and after service of execution, defendant appeared on January 15, 1927, and filed a petition asking to have said judgment vacated. In this petition defendant avers that she had no notice of the judgment until December 31, 1926, when she was served with a copy of the execution; and that she has a good defense to the suit. The petition sets up the facts practically as heretofore set forth in this opinion, and charged as a matter of law that the lease and all the covenants thereof, including the power of attorney and the cognovit contained in said lease were terminated by the plaintiff prior to the obtaining of the plaintiff's judgment on the lease.

The position taken by counsel for defendant seems to be that by the service of a notice to terminate the lease under the forcible entry and detainer proceedings, the plaintiff had, by her actions in bringing said suit, expressly terminated the lease and had obtained the assistance of the court, by an order of restitution, in legally securing the termination. To this plaintiff replies that by the clause in the lease, above quoted, the defendant expressly agreed that she was to be liable for rent regardless of the institution of

The judgment by the court was for $[illegible], and was for the year for the month of September and the first and second days of October, 1[illegible]. During this time the Kilbourn below was in actual possession and possession of the premises. The trustee further claimed that the notice in the Lexington entry and detainer suit was served on September 7 of that year and the judgment of possession was entered on September 25 [illegible].

The judgment on the issue, for rent, was entered October 18, of that year and an execution issued thereon; and after service of execution, defendant appeared on January 18, 1907, and filed a petition setting to have paid judgment vacated. In this petition defendants avers that she had no notice of the judgment until January 23, 1907, when she saw a copy of the execution; and that she has a good defense to the suit. The petition sets up the facts practically as hereinbefore set forth in this opinion, and charged as a matter of law that the lease and all the covenants thereof, including the power of attorney and the confession contained in said lease were terminated by the plaintiff prior to the obtaining of the plaintiff's judgment on the lease.

The petition then by demurrer for defendant sets to be met by the service of a notice to terminate the lease under its terms, were not material proceedings, the plaintiff had, by her actions in bringing this suit, expressly terminated the lease and obtained the assistance of the court, by its order of restitution, in legally securing the premises. In this [illegible] [illegible] in the lease, they pleted, the defendant expressly agreed that she was to be liable for rent regardless of the institution of

any legal proceedings, during the time of the use and occupation of the premises by her. It is agreed that the judgment for rent is for the exact period that the defendant below remained upon and in possession of the premises in question. A case very much in point is the case of Grommes et al v. The St. Paul Trust Co., et al, 147 Ill. 634. The case in question was not a confession of judgment but an action brought upon a lease, for rent, based upon a clause in the lease, which was to the effect that a re-entry and taking of possession by the landlord shall not have the effect of determining the lease, nor operate to prevent its continuing in force. The court in its opinion at page 643 says:

> "On the contrary, the lease provides, in substance, that a re-entry and taking of possession by the landlord shall not have the effect of determining the lease, nor operate to prevent its continuing in force. No other meaning can be given to the words, 'without such re-entry working a forfeiture of the rents to be paid * * * during the full term.' There is nothing illegal or improper in an agreement, that the obligation of the tenant to pay all the rent to the end of the term shall remain notwithstanding there has been a re-entry for default; and, if the parties choose to make such an agreement, we see no reason why it should not be held to be valid as against both the tenant and his sureties. * * * It may not be strictly accurate or correct to call the money to be paid after re-entry rent, or to treat the lease as in force after re-entry. But the parties have a right to fix the amount of the rent to accrue according to the terms of the lease, as the amount of the damages to be paid by the tenant in case of a breach of his covenants. It can make but little practical difference whether the sum agreed to be paid be called rent or damages. It may be regarded as damages for the purposes of this suit."

This court is of the opinion that under this clause of the lease, the plaintiff below was entitled to collect the rent during the time the premises were occupied by the defendant, regardless of the pendency of the suit for possession. The defendant had the actual use and possession of the

premises, and in good conscience should pay for the same.

It is the opinion of this court that the petition filed by the defendant for the purpose of setting aside the judgment for rent did not set up a good defense to the claim; and that the trial court properly refused to set aside the judgment.

For the reasons stated, the order of the Municipal Court denying and overruling the motion to vacate the judgment will be affirmed.

ORDER AFFIRMED.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

premises, and in good conscience should pay for the same.

It is the opinion of this court that the petition filed by the defendant for the purpose of setting aside the judgment for rent did not set up a good defense to the claim; and that the trial court properly refused to set aside the judgment.

For the reasons stated, the order of the Municipal Court denying and overruling the motion to vacate the judgment will be affirmed.

ORDER AFFIRMED.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

376 - 31887

GEORGE M. AKERS, Appellee, v. PAUL HASSEL, ET AL	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
On appeal of JOHN H. BILLSBURY, Appellant.	

Opinion filed Dec. 21, 1927.

MR. JUSTICE WILSON delivered the opinion of the court.

The facts in this case disclose that the defendants Paul Hassel, M. A. Johnson, Charles J. Moore, Joseph D. Cronin, John G. Fitzgerald, G. L. Wood, F. R. Manning, D. N. Muskovitz and John H. Billsbury, made application for a charter for an insurance company, to do business in the State of Illinois, and to be known as the Pioneer Life Insurance Company. The application was made pursuant to "An Act to Regulate Life Insurance," approved March 26, 1869, in force July 1, 1869, and acts amendatory thereto. Pursuant to their purpose to incorporate said insurance company, and to obtain subscriptions to the capital stock, certain subscription forms or blanks were issued, and, among others, one George M. Akers, plaintiff herein, subscribed for stock to the amount of $2,000 and paid for his subscription in cash and received a receipt therefor, which was offered in evidence. The money was paid to F. R. Manning, one of the defendants herein, and one of the corporators of the proposed Pioneer Life Insurance Company.

Opinion filed Dec. 21, 1927.

On behalf of the defendant Billsbury who perfects this appeal, it appears from the testimony that he stated he signed the application for a charter at Manning's request; that he never heard of any meeting of the incorporators afterward and did not know he was an incorporator; that he never attended any meetings and did not know that the incorporators had filed with the Secretary of State a form of receipt or stock subscription; and that he never authorized Manning to solicit such subscriptions.

This action is predicated upon Section c of paragraph 11, of An Act in Relation to the Promotion and Organization of Insurance Corporations, under the Insurance Act, chapter 73, of Smith & Hurd's Revised Statutes. The particular section in question reads as follows:

> "Funds and securities held by the corporators as bailees for the subscribers, shall be deposited with a National Bank or a State bank or Trust Company of the State or County under the laws of which such corporation is being organized, until it has been duly authorized to carry on the business for which it is being organized, and every contract within subsection (a) shall contain a stipulation to such effect."

Paragraph 14 of this Act provides a penalty of a fine or imprisonment for failure to comply with all the provisions of the Act.

From the testimony it appears that no money was deposited with the First National Bank of Chicago, Illinois, as was provided for in the subscription form circulated by the corporators of the proposed Life Insurance Company.

The principal question involved in the case is that of the character of liability, if any, on the part of the

defendant Billsbury. The action is predicated on the theory that he was a bailee, as provided in the Insurance Act hereinbefore referred to. If Billsbury, the defendant below, was bailee and the money in question was converted, an action in trover would lie and it would not be necessary to make a demand upon him for the money in order to maintain the action. McConnell v. Hamp, 147 Ill. App. 56.

It appears from the testimony that the defendant Billsbury at no time had in his possession any of the money involved in this litigation, and it becomes a question for decision as to whether or not, under the circumstances, he is jointly and severally liable with the other corporators for failure to deposit the money received by some one of them pursuant to the provisions of the statute, made and provided.

We can see no force in the argument of the defendant Billsbury, that after signing the application for a charter, he never attended any meeting nor knew of any meetings, formal or informal; nor authorized or directed Manning to solicit subscriptions, and, in fact, did not know that Manning was so doing. The entire testimony of the defendant Billsbury, in this connection, shows an utter disregard of his obligation to those who might subscribe to the capital stock of the insurance company, which action on their part might, perhaps, have been based on the fact that his name was among those making application to the State Insurance Department for the right to incorporate an insurance company under the laws of the State of Illinois. A person who undertakes to act as a corporator of an insurance company owes more of an obligation to subscribers than to negligently fail to perform any duty

defendant at liberty. The notion is predicated on the theory that he was a bailee, no provision in the insurance act be-ing before referred to. If military, the defendant bailee, was bailee and the money in question was converted, an action in trover would lie and it would not be necessary in such a demand upon him for the money in order to maintain the action. Hammond v. Shaw, 147 Ill. App. 98.

It appears from the testimony that the defendant Kellogg at no time had in his possession any of the money involved in this litigation, and it is a mere a question for determination as to whether or not, under the circumstances, he is jointly and severally liable with the other conspirators for failure to deposit the money received by some one of them pursuant to the provisions of the statute, which has provided.

We can see no force in the argument of the defendant Kellogg, that after signing the application for a director, he never attended any meeting nor knew of any meetings, formal or informal, nor participated or directed anything in relation subscriptions, and, in fact, did not know that anything was so doing. The entire testimony of the defendant Kellogg in this connection, shows no more than a mere obligation to have his right subscribed on the merits of the in-surance company, with which he (Kellogg) probably have been based on the fact that he was among those making applications to the State Insurance Department for the right to incorporate an insurance company under the laws of the State of Illinois. I cannot see wherein he is not as a conspirator of an insurance company does not of an obligation to subscribe then to reasonably fail to perform any duty

whatsoever to protect their interests.

It is argued that after the two year period provided for by statute for the accomplishment of the incorporation, an action for assumpsit might lie, but it does not alter the situation that if there has been a misapplication of money collected, a liability as bailee under the statute would arise.

The facts in this case show that the money of the plaintiff below was paid on June 19, 1924 and July 24, 1924; and on the hearing, November 4, 1926, over two years after the money had been paid by plaintiff, the record shows, there had been no money deposited with the First National Bank of Chicago, as was provided for in the subscription blanks, and as a condition, based upon which the plaintiff paid his money to Manning, one of the corporators herein. The facts clearly show, in the absence of proof to the contrary, that there had been a conversion of the money paid.

Where a person undertakes to assume a liability as a corporator of an insurance company, under a statute which provides that by undertaking so to do he assumes the liability of a bailee and becomes jointly and severally responsible with the other corporators, he cannot be heard to deny that liability on a proceeding to recover against him, based upon the failure of the corporators to perform their legal obligation in conformity to the statute under which they attempted to act.

The Supreme Court of this State in the case of Loverin v. McLaughlin, 161 Ill. 417, which held that directors and officers of a corporation were, under the statute, liable

thoroughly to review their interests.

It is argued that after the year period provided for by statute for the commencement of the investigation, an action for unjustly enriched, but it does not alter the situation that it there has been a misappropriation of money entrusted, a SECURITY or before make the absolute unjustified.

The fraud in this case after that the money of the plaintiff before was paid on June 19, 1882 and July 26, 1882; and in the testimony, showed that the defendant paid the money had been paid by plaintiff, the second claim, there had been no money deposited with the first defendant also of Dike, as was provided for in the subscription claims, and a condition, based upon which the plaintiff paid his money to Dike, one of the corporators herein. The facts clearly show, in the absence of proof to the contrary, that there had been a conversion of the money paid.

Where a person undertakes to receive a liability on a corporator of an insurance company, under a scheme which provides that by undertaking so to do he assumes the liability of a bailee and becomes jointly and severally responsible with the other corporators, he cannot be heard to deny that liability on a succeeding to recover against him, based upon the failure of the corporators to perform their legal obligation in relation to the entire-money-to-the-stockholders in act.

The Supreme Court of this State in the case of Lewis v. Lamphrey, 121 Ill. 447, which held that directors and officers of a corporation were under the statute, liable

for its debts, contracted by them in the name of the corporation before the certificate of its organization had been recorded in the county where its principal offices were located, says in its opinion at page 430:

> "What, then, was the intention of the legislature in adopting section 18, which will be made manifest by the insertion of the word, 'or', between the clauses in question? The intention was to secure the public, dealing with corporations, against the evils of illegal or incomplete organization, and fictitious or bogus subscriptions, by placing upon the managing officers or directors the responsibility of seeing to it, that the provisions of the incorporation act shall be fully complied with, and that the subscriptions to the capital stock shall be made in good faith."

The court again at page 434 says:

> "Section 18 imposes the liability upon the officers and directors, because, being prohibited from proceeding to business, they permit business to commence and liabilities to be incurred in violation of their duty. The creditor's right of recovery is totally unaffected by any actual loss or injury he may have sustained by the failure or neglect of the officers or directors. (Diversey v. Smith, supra; Mackerson v. Theeler, supra). He is entitled to recover, if he shows that he is a creditor - that the defendants are such officers, agents or directors as are mentioned in section 18, and that one of the provisions of the act, such as the requirement to record the certificate, has not been complied with or that all stock named in the articles of incorporation has not been subscribed in good faith. There was no estoppel by reason of contract with the pretended or incomplete corporation."

So it would appear in the case in question, that the failure of the corporators to comply with an essential provision of the act, created a joint and several liability against each and all of them, by reason of their failure to make a deposit of the funds collected, in accordance with the section of the statute provided for that purpose. Insurance business particularly is impressed with a public interest, and the right to carry on a business of this character depends upon a strict compliance with the statutes provided for that purpose; it being

the intention of the legislature to secure such a transaction with more than the ordinary safeguards. North American Ins. Co. v. Yates, 314 Ill. 272; Integrity Mutual Ins. Co. v. Boys, 293 Ill. 307. Those undertaking to organize a corporation of this character are held to a strict compliance with the legislative requirements, passed for the benefit of the public, and in the case at bar the acts of the defendant Billsbury indicate a total disregard of his obligation toward the subscribers to the capital stock and toward the general public. The statute created his liability and at the same time gave the subscriber his right to a cause of action against the defendant, and gave him an individual right of enforcing that liability.

For the reasons stated in this opinion, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

247 I.A. 617

285 - 31896

L. W. DIMSDALE, Appellant, v. ELIZABETH McNULTY, Defendant, ——— LYON & HEALY, INC., Garnishee, Appellee.	APPEAL FROM MUNICIPAL COURT, OF CHICAGO.

MR. JUSTICE WILSON delivered the opinion of the court.

The facts in this case disclose that on January 7, 1926, a judgment for $150.00 and costs was entered against the defendant Elizabeth McNulty, in favor of the plaintiff L. W. Dimsdale, in the Municipal Court of Chicago. Execution issued and was returned "No Property Found." An assignment of the judgment appears to have been made to one William H. Riley, on April 18, 1926, and on April 27, of the same year an affidavit for garnishment summons was filed and summons issued against Lyon & Healy, Inc., appellees herein. This summons was returnable May 5, 1926, and on that day a rule was entered on the garnishee to answer in ten days. On June 2, 1926, trial was had an a default for failure to answer in compliance with the order of May 5, 1926, was entered, with judgment against the garnishee. Execution was ordered and was issued against the garnishee, pursuant to said judgment, and on August 20, 1926, a motion was made to vacate that judgment. This motion

was made over thirty days after the entry of the judgment in question, and coming on to be heard before the Municipal Court the motion was allowed, and thereupon, the court's attention being called to the fact that over thirty days had expired after the rendition of the judgment, that motion was vacated but leave was given to the garnishee to file a petition in accordance with the statute. This statute, known as Section 41 of the Municipal Court Act, provides as follows:

> "If no motion to vacate, set aside or modify any such judgment, order or decree shall have been entered within thirty days after the entry of such judgment, order or decree, the same shall not be vacated, set aside or modified excepting upon appeal or writ of error, or by a bill in equity, or by a petition to said Municipal Court setting forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside, or modified by a bill in equity; Provided, however, that all errors of fact in the proceedings in such case, which might have been corrected at common law by a writ of error coram nobis may be corrected by motion, or the judgment may be set aside in the manner provided by law for similar cases in the circuit courts."

The petition in support of the motion to set aside the judgment was filed September 7, 1926, and in substance stated that on the 5th day of May, 1926, one I. B. Confelt, a [illegible] clerk in the office of the attorney for the garnishee, appeared in room 812 and delivered an oral answer to the clerk of the court of "No Property," and that the clerk advised her that such order would be entered, which was the customary procedure in said court room. Affiant further states that she has been informed that an order was entered by mistake, wherein garnishee had been given ten days to answer; and that at the expiration of said time to answer a judgment was entered, without her knowledge; that on June 2, 1926, the garnishee was served

was made over thirty days after the entry of the judgment in question, and owing to it on hand before the municipal Court the motion was filed, and therefore, the court's attention being called to the fact that over thirty days had expired after the rendition of the judgment, that motion was vacated and leave was given to the principle to file a petition in conformance with the statute. This statute, found as Section 1 of the municipal court act, provides as follows:

> "If no motion to vacate, set aside or modify any such judgment, order or decree shall have been made within thirty days after the entry of such judgment, order or decree, the same shall not be vacated, nor aside or modified anything upon appeal or trial de novo, at law or equity, or in a criminal case, but remains in full force and effect for vacating, setting aside or modifying the same, which may be instituted to cause the same to be vacated, set aside, or modified by a writ in equity; provided, however, this all stands and has to be prosecuted in such case, which shall have been commenced at least by a writ of error before the judgment is executed by action, or the judgment may be set aside in the manner provided by law for similar cases in the circuit courts."

The petition in equity of the relator to not vacate the judgment was filed September 7, 1888, and in substance stated that on the 6th day of May, 1888, one C. C. Conklin, a clerk in the office of the attorney for the prosecution, appeared in room 212 and delivered an oral answer to the clerk of the court of "Is Trespass", and that he, the clerk, believed that such order would be entered, which was the customary procedure in said court room. Affiant further states that she has been informed that an order was entered by default, although pleadings had been given ten days to answer and time of the commission of said time to answer a judgment was entered, without the knowledge; that on June 8, 1888, the petitioner was served

with a copy of the execution. Petitioner asked that the court vacate the final judgment heretofore entered against the garnishee, on to-wit: the 2d day of June, 1926. From this affidavit and petition it would appear that the garnishee had been served and had been represented in court and that a final judgment had been entered on the 3d day of June, 1926. The only question for consideration appears to be as to whether or not the petition and affidavit was a sufficient compliance with the statute, by virtue of which petition and affidavit in support thereof, a court would be justified, after the expiration of the period provided by the statute, in vacating a judgment theretofore entered. There is nothing in the petition which would appeal to a court of equity nor which would show any diligence on the part of the garnishee or anyone on its behalf; or any facts which would justify a court in saying that it had presented a state of facts which would have been sufficient on a bill in chancery to have called for the aid of a chancery court in the prevention of the issuance of the execution upon the judgment originally entered. An appeal would properly lie from this order, as has been frequently held in this court. Imbris v. Bear, 230 Ill. App. 155. Neither is there any custom known to this court by which it was customary for clerks of courts to see to it that orders should be entered in pending causes.

For the reasons stated in this opinion, the order of the Municipal Court, entered September 24, 1926, vacating the judgment of June 2, 1926, against the garnishee defendant Lyon & Healy, Inc., be and is hereby reversed, and the cause is remanded to that court with directions to vacate said order and permit the judgment of June 2, 1926 to stand.

TAYLOR, P.J. AND HOLDOM, J. CONCUR. REVERSED AND REMANDED WITH DIRECTIONS.

with a copy of the proposition. Petitioners asked that the court review [illegible] on the merits, on the 22 day of June, 1970. From this affidavit and petition it would appear that the revocation had been served and had been recognized in court and that a final judgment had been entered on the 24 day of June, 1970. The only question for consideration appears to be as to whether or not the petition and affidavit was a sufficient compliance with the statute, by virtue of which petition and affidavit in support thereof, a court would be justified, at the expiration of the period provided by the statute, in vacating a judgment [illegible]. Since in petition in the instant case would appear to be a case of doubtful [illegible] which would give any citizen on the part of the petitioner or appellee an [illegible], or any other [illegible] a court to decide that it did prevent a right of [illegible] would have been sufficient on a bill in chancery in the action for the aid of a chancery court in the prevention of the issuance of the execution upon the judgment originally entered. An appeal would properly lie from this order, as has been frequently held in this court. Jenkins v. [illegible], 320 Ill. App. 188. Neither is there any question known to this court by which it was customary for clerks of courts to use to if that orders should be entered in pending causes.

For the reasons stated in our opinion, the order of the Municipal Court, September 24, 1970, vacating the judgment of June 4, 1970, against the purchase Corporation Lyon & Healy, Inc., be and is hereby reversed, and the cause is remanded to that court with directions to vacate said order and restate the judgment of June 4, 1970 to stand.

[illegible], P.J., and [illegible], JUSTICES, AND MCGLOON, [illegible].

75 - 32013

247 I.A. 617

ALEXANDER BENDER, (Complainant Below), Plaintiff in Error, vs. FELIX WANATOWICZ, (Defendant Below), Defendant in Error.	ERROR TO SUPERIOR COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The complainant, Bender, appeals from an order which dismissed his bill for want of equity. The subject matter of the litigation is $1050 which defendant received as earned commissions for the sale of certain real estate. This sum was paid to him on December 15, 1925, by Stanley G. Milewski at the end of litigation which was reviewed by this court in the case of Wanatowicz v. Milewski et al., General No. 29201, in which an opinion was filed April 29, 1926. It was urged as a defense to that suit that if any commission was due it was to a copartnership, and the complainant, Bender, testified to that effect in that suit. The verdict of the jury, however, was against this contention, and this court refused to set aside the judgment entered on that verdict.

Of course, the complainant not being a party to that proceeding, the same is not res adjudicata as to him. After the payment of this commission the complainant began this present litigation by filing a bill in equity, in which he alleged that on or about June 1, 1921, he formed a copartnership with the defendant for the purpose of conducting a real estate brokerage business upon an agreement that defendant and complainant should each receive one-half of the profits earned by the copartnership

and should share the losses of the business in the same proportion.

The bill avers that the copartnership continued until December 10, 1922, at which time it was dissolved by mutual consent and alleges that at that time this commission of $1050 was due from Stanislaw O. Milewski to that copartnership, and the bill prays an accounting.

The defendant answered, denying that there was a partnership agreement as alleged, denying that the partnership was dissolved on December 10, 1922, and denying that a commission of $1050 was due to the copartnership, but alleging that on the contrary the money was the sole commission of the defendant. The answer further denied that there was any sum of money due from the defendant to the complainant whatever or that he is entitled to any relief. The court heard the evidence and dismissed the bill for want of equity as heretofore stated.

It is urged for reversal that the evidence sustained the allegations of complainant's bill and that this $1050 received by the defendant became a part of the partnership assets. The evidence shows conclusively that a partnership was entered into by these parties and that that partnership was dissolved prior to the payment of this commission to the defendant. The complainant testified that notice of the dissolution of the partnership was given on December 10, 1922, while defendant testified that the notice of dissolution was given by the defendant to the complainant on September 19, 1922, before the contract for the sale of the property of Milewski to one Kottas was made. That contract, it appears without dispute, was entered into October 17, 1922.

It is also conceded that a notice was given by defendant to complainant terminating the partnership, but complainant does not produce the notice, saying that it was lost or destroyed in a fire. Each of the parties offered evidence tending to support

and should share the losses of the business in the same proportion. He then avers that the copartnership continued until December 10, 1951, at which time it was dissolved by mutual consent and alleges that at that time this consideration of $2500 was due from Stanislaw C. Ellowski to that copartnership, and for this prays an accounting.

The defendant answered, denying that there was a partnership agreement as alleged, denying that the partnership was dissolved on December 10, 1951, and denying that a consideration of $2500 was due to the copartnership, but alleging that on the contrary the money was the sole consideration of the defendant. The answer further denied that there was any sum of money due from the defendant to the complainant whatever or that he is entitled to any relief. The court heard the evidence and dismissed the bill for want of equity as hereinbefore stated.

It is urged for reversal that the evidence sustained the allegations of complainant's bill and that this $2500 received by the defendant became a part of the partnership assets. The evidence shows undisputedly that a partnership was entered into by these parties and that that partnership was dissolved prior to the payment of this consideration to the defendant. The complainant testified that notice of the dissolution of the partnership was given on December 10, 1951, while defendant testified that the notice of dissolution was given by the defendant to the complainant on September 15, 1951, before the contract for the sale of the property of Ellowski to one Anton was made. That contract, it appears without dispute, was entered into October 15, 1951.

It is also conceded that a notice was given by defendant to complainant terminating the partnership, but complainant does not produce the notice, saying that it was lost or destroyed in a fire. Each of the parties offered evidence tending to support

their respective contentions as to the time at which the notice of dissolution was given, and the fact of the right to terminate the partnership by such notice does not seem to be disputed.

The complainant contends that the existence of the partnership having been proved, the burden of proving the dissolution of the same was on the defendant, and that it was for the defendant to show by a preponderance of the evidence that the partnership was dissolved on the date which he alleges; that there is a presumption of the law that the partnership would continue and that in the absence of such preponderance of the proof on defendant's part, his contention that the partnership was dissolved in September must fail.

This is hardly a fair statement of the condition of the record. Not only does a preponderance of the evidence indicate that the partnership was in existence, but it is conclusively proved that it was dissolved prior to the collection of this commission. The issue is whether the dissolution occurred in September as defendant testified, or in December as complainant testified. There are facts in the record tending to corroborate, together with facts tending to discredit, the testimony produced by both parties. The rule by which this court must be governed in determining whether it will reverse the decree, is whether the decree is clearly and manifestly against the preponderance of the evidence. We cannot so hold in this state of the record. The advantages which the Chancellor had in seeing and hearing these witnesses as they testified lead us to conclude that this court ought not to reverse on the ground urged by the complainant.

The decree is therefore affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

87 - 32027

247 I.A. 617

JOHANNA OEDEES, Defendant in Error, vs. EVELYN OEDEES, Plaintiff in Error.	ERROR TO SUPERIOR COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The defendant has appealed from a decree which granted a divorce to his wife, complainant, and directed the payment by him to her of certain alimony and solicitor's fees. The complainant has not appeared in this court to support the decree. The bill was filed on May 1, 1925, averring the marriage of the complainant and the defendant on July 7,1919, at Crown Point, Indiana, and averring that no children had been born of the marriage. As ground for divorce, the bill set up that the defendant had been guilty of extreme and repeated cruelty. In particular it charged acts of cruelty in the months of March, 1921, July, 1924, September, 1924, and on April 22, 1925. The bill also averred that defendant was a cattle dealer and was earning at least seventy dollars a week.

The defendant answered, denying the acts of cruelty and denying that he received an income of seventy dollars a week.

Complainant testified to acts of cruelty in March, 1920, and on July 4, 1924, and stated that she separated from the defendant on April 22, 1925. The mother of complainant also testified corroborating complainant as to the incidents of alleged cruelty in March, 1920, and on July 4, 1924, but there was no proof tending to support the other allegations of cruelty. Disregarding defendant's alleged variance as to the date of the first act of cruelty, it appears from the record that from July 4, 1924,

to April 22, 1925, complainant continued to live with defendant, notwithstanding the prior acts of cruelty; and it has been held in Young v. Young, 130 Ill. 236, that such action amounts to condonance of the previous acts of cruelty. For this reason we must hold the proof insufficient to sustain the decree.

An examination of the evidence further discloses that the proof of the financial condition of the defendant at the time of the entry of the decree was meager, while there is no proof at all as to the value of the fees of complainant's solicitor.

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor and McSurely, JJ., concur.

124 - 32065

247 I.A. 618

FRANK W. HARTZER,
Appellee,

vs.

LARS OLSON, Doing Business as OLSON BROS.,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by the defendant from a judgment in the sum of $1350 entered upon the finding of the court.

The plaintiff sued for damages for the alleged failure of defendant to deliver to plaintiff fifteen shares of the preferred stock of the Mishawaka Theater Corporation according to the terms of a written agreement dated September 23, 1924.

The contract sued on recites:

> "That in consideration of the services to be performed by the party of the second part, in procuring a contract between the party of the first part and the Mishawaka Theater Corporation, the said party of the first part does hereby agree to and does hereby assign and transfer to the said party of the second part (15) Shares--Fifteen shares of the par value of One Hundred ($100) Dollars each, of the preferred stock of the Mishawaka Theater Corporation, and does hereby agree that upon the delivery of said stock to the said first party by said corporation, that said first party will duly assign and deliver the same to said party of the second part.
>
> "Witness our hands and seals this 22 day of September, 1924.
>
> (Signed) Olson Bros."

The statement of claim averred that plaintiff "performed services therein specified to be performed by him and procured the signature of the Mishawaka Theater Corporation on a certain contract for the carpenter work for the Mishawaka Theater Corporation, Mishawaka, Indiana." It also averred that defendant failed and refused to assign and transfer the stock in accordance with the agreement.

The affidavit of merits averred in substance that the

plaintiff had never performed any services for the defendant in procuring the contract and had never rendered services of any kind entitling him to compensation and that he was not entitled to the shares of stock in question nor to any amount of money whatever.

Upon the trial plaintiff called the defendant, Lars Olsen, as plaintiff's witness under section 33 , and the evidence shows that he is a carpenter contractor and that he secured a contract for carpenter work for the Mishawaka Theater Corporation at Mishawaka, Indiana; that he had performed the work and had been paid the contract price which included fifteen shares of the preferred stock of the Theater corporation.

A writing was received in evidence which purports to have been made on September 23, 1924, and is signed by the defendant Lars Olsen as Olsen Bros., but does not contain the signature of the plaintiff. The secretary of the Theater corporation testified that the corporation was organized in 1924; that he had been its manager since it was in operation, and that he had something to do with the letting of the contracts for the construction work on the theater; that the Theater corporation entered into a contract with Olsen for the carpenter work; that he transacted the business in connection with this contract with Mr. Levine, an architect, and Mr. Hartzer, the plaintiff; that he had never seen Olsen prior to the signing of the contract; that Levine was an architect and one of the contractors on the job; that "Mr. Hartzer was the man I went to at first in order to get the building built, and he was constantly in touch with our side of it, and Mr. Levine as I understood it;" that the contract was brought to him by Hartzer and Levine; that he did not remember whether he or Olsen signed first. He further replied in response to questions as to what Hartzer had to do with the procuring of this contract that he "thought that Mr. Hartzer

was always in the capacity of representing Levine & Company to our company;" that he, Hartzer, brought the contract up with Mr. Levine and presented it "to our company, and it was signed;" that Levine, as one of the contractors, was considerably lower and also Mr. Olson's and other contractors' bids were considerably lower, and that "we" naturally accepted their bids. On cross-examination he said that Mr. Olson's bid was accepted as it was the lowest bid for that work; that the bids were presented as a group by Mr. Hartzer and Mr. Levine; that Levine and Hartzer got the bids from the different contractors in Chicago and bulked them in for the completion of the building from each separate contractor, and then submitted the bids as a group on the entire cost of the building; that Olson's bid was the only one they had for the carpenter work and it naturally was the lowest, and it was accepted for the reason that it came as a whole thing with the other bids; that the bid he saw was not only one of a group, that he didn't know which was Olson's, and which was the other, just so the building was built for a certain figure, which was a saving of fifteen or twenty thousand dollars; that a local firm had made one bid for the entire work; that he did not know who procured the bids for the various contracts; that Mr. Hartzer and Mr. Levine submitted them; that he dealt with Levine who presented Olson's contract; that he did not pay Mr. Hartzer anything; that as he understood it the only thing Hartzer had to do with it was as a representative of Mr. Levine; that there was a building committee for the theater on which witness served, and that all agreed on Olson's contract on the ground that it was the lowest; that it was Levine's duty to get the contract as low as possible as he was working in his own behalf in getting bids and getting contracts for the building; that the duty of Mr. Levine at the time Olson's contract was made, was to get some contractors together to build the building at as low a cost as possible, which he did for the purpose of erecting the building and getting the con-

tract.

The contract between Olson and the Theater corporation provided that Olson should receive $[illegible],500 for the work and fifteen shares of the preferred stock of the Theater corporation of the value of $100 a share, as part payment on the contract. The witness said that the first time he saw the contract was when an order came through for the Theater corporation to transfer stock, after the building was erected; that he did not see anything like it before the building was erected; that Mr. Hartzer had no connection with the building except as a representative of Mr. Levine; that it was not a part of Levine's duties to represent the Mishawaka Theater Corporation in the letting or signing of contracts; that he brought the contracts at a price bidding in a lump; that he was not hired by the Mishawaka Theater Corporation to do this work, and it was not a condition of his having the contract. The Theater Corporation took the position that it wanted the business; that it wanted to have the building built as well as possible and as cheaply as possible, and that Levine was not to enter into any part of it unless he could show a material saving, and on that condition he got his contract.

Plaintiff testified that Mr. Levine told him that he, Levine, represented a group of contractors and that if he, Hartzer, could get bids for him he would give him a certain commission for them; that he went back and forth to the theater while the bids were being figured, and that Levine also got bids from his people and gave them to plaintiff; that Levine got Olson's bid and many of the bids were higher, and these were signed and delivered to the Theater Corporation and delivered back to Levine's office; that plaintiff gave Levine quite a number of contracts for each contractor to assign to him in getting the work for him; that the contract with Olson was among these; that he, Hartzer, delivered several of these to Levine and this one was among them, and that

he took various contracts to Mishawaka, Indiana; that they were signed there at different times; that he, Hartzer, brought these back and gave them to Levine; that he received the document upon which suit was brought from Levine; that he was not working for the Mishawaka Theater Corporation; that he never saw the defendant Olson until a week after the job had been finished; that he had never met him before; that he first learned of the existence of the contract when Levine had the contract signed but he had never talked to the defendant about it; that under the carpenter contractor's contract with the theater there was no particular work to do outside of procuring the contract; that he only waited for the stock to be delivered to Olson. He says:

> "In the entire transaction I was representing Olson through Mr. Levine, who claimed that he was an agent of Olson; I only knew what Mr. Levine told me. I had never talked to Olson; there was a group of eight or nine contractors that had this same document and they were all returned to me at the same time (referring doubtless to assignment of shares.) After Levine told me he had had that signed (referring to said contract sued on in this case) I waited and inquired from Levine if Olson had received his stock yet and waited to know if the stock was delivered to him which was months and months after the work was completed, in your office, and when the final payment was being arranged for, almost a year after the work was completed."

He says that Levine got the bids first and kept them, and that they were working in South Bend with some local contractors on local bids; that the plaintiff strained every effort to get the Mishawaka Theater to go to Ruben Levine Company, which was accustomed to doing that kind of work; that he was present when the Mishawaka people decided to accept the bids; that they were not let at one time, but they were turned over to Levine when he let them all. He says he talked with Mishawaka and tried to impress upon their minds that if they took these bids they would get a group of contractors who had done this kind of work and would be able to do a better job. He says that when Mr. Levine solicited bids he did not do it on behalf of the Theater Corporation but on behalf of plaintiff; that he got Mr. Levine this work and that Levine was to get people he represented to pay that commission; that he was

on neither the payroll of Levine nor the Theater Corporation.

The defendant in his behalf testified that he made only one bid; that he had never said anything to Mr. Levine about representing him; that he was called on September 3rd, 1924, to come to Levine's office; that Levine handed the contract over to him and he signed it; that this was before the building was built and approximately a month after the contract was signed for the carpenter work.

The evidence also shows that the fifteen shares of stock in question were turned over to the defendant in the month of July, 1926.

Propositions of law and fact were submitted; but the record fails to disclose whether the same were submitted on behalf of the defendant or the plaintiff. It is assigned and argued as error that the court rendered judgment in favor of the plaintiff and against the defendant, and this assignment must, we think, be sustained. As a matter of fact, the contract had already been let to Olson because he was the lowest bidder prior to the execution of the document on which the plaintiff sues. This document is not even signed by the plaintiff and does not contain a promise on his part either to do or to refrain from doing anything requested by Olson. The evidence wholly fails to show that Levine had any authority to employ plaintiff to represent the defendant. In other words, the record fails to disclose either a valid contract between Olson and Plaintiff, or (assuming that the supposed contract was a valid one) that the plaintiff performed any services in the interest of Olson thereunder.

The judgment is therefore reversed with a finding of facts.

REVERSED WITH A FINDING OF FACTS.

O'Connor and McCurely, JJ., concur.

124 - 32065 FINDING OF FACTS.

We find as facts that the plaintiff, Hartzer, did not perform any services in defendant's behalf under the alleged contract sued upon; that the alleged contract upon which suit is brought was never in fact executed and delivered as between the supposed parties thereto, and that plaintiff is not entitled to recover on account of the refusal of the defendant to assign to plaintiff the stock described in the statement of claim.

151 - 32092

247 I.A. 618

GREAT LAKES FORGE COMPANY,
Appellant,

vs.

R. M. EDDY FOUNDRY CO.,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Plaintiff sued, alleging that defendant failed to give delivery orders or to accept delivery as agreed of the balance of an order for drop forgings to be manufactured by the plaintiff at defendant's request. The order was given on May 14, 1923, and is in writing. The particular time within which the forgings should be manufactured and delivered by plaintiff was not stated, but the evidence tends to show that three months would have been a reasonable time.

The order was for 20,000 sets of forgings of six parts each, making a total of 120,000 parts or pieces, and it appears that the plaintiff manufactured and delivered 83,090 of these parts from the time the order was given up to and including January 17, 1924. The statement of claim avers that the defendant paid for such forgings as were actually furnished and delivered; that the purchase price of the balance of the pieces amounted to $3,430.60; that the total cost of completing the parts would have been $1,819.47, leaving a difference of $2,313.27, for which the defendant was liable to the plaintiff by reason of the breach of the contract. Plaintiff also made claim for the purchase price of certain high carbon steel alleged to have been purchased by it for the manufacture of these forgings to the amount of $394.[illegible], which steel, it averred, is still held subject to the order of the plaintiff, making a total claim of $2,612.87.

The defendant in its affidavit of merits denied the execution of a contract as alleged and denied that it had refused to give delivery orders or accept delivery of the remainder of the drop forgings for which it admitted a purchase order had been given. It also denied that the plaintiff was ready, willing and able to furnish the forgings as alleged or that it delivered forgings in accordance with the orders required by the defendant. The defendant further averred that prior to December 14, 1923, a dispute arose between plaintiff and defendant relative to the terms of payment for the forgings delivered and that the parties agreed to cancel the purchase order; that by agreement both verbal and written the said purchase order was cancelled.

A jury was waived and the cause submitted to the court. The court found for the defendant and entered judgment for costs against the plaintiff. The ruling of the court upon propositions of law submitted indicates that the case was decided upon the theory that the order upon which suit was brought had been rescinded and abandoned by mutual agreement of the parties, and further that the evidence bearing upon the amount of damages was purely speculative.

The evidence tends to show without dispute that the forgings were manufactured and deliveries made of various quantities of the forgings, and that on December 13, 1923, the attorneys for the plaintiff wrote defendant stating that plaintiff had placed a claim against defendant in their hands for collection amounting to $3,930.72 and authorized suit if the matter was not taken care of by Saturday noon, December 15th. The letter said: "Should you call up or come in, please ask for Mr. Andrews." In response to that letter Mr. Charles M. Eddy called at the office of the attorneys, and on the same day, December 14th, wrote a letter which Mr. Eddy says practically covered the conversation. This letter in substance stated defendant's regret at the stand which had been taken, which the writer presumed was because of an appointment which unfortunately

The defendants in the affidavit of merits insist the

execution of a mortgage on which, and should just it not relieve

to give delivery orders or accept delivery of the remainder of the

grain regardless for which it admitted a previous order had been given.

It also denied that the validity was ready, willing, and able to give

with the foregoing as alleged of that it delivered foregoing in accordance

made with the orders required by the defendant. The defendant

further avers that prior to December 14, 1920, a dispute arose

between plaintiff and defendant relative to the terms of payment for

the foregoing delivered and that the parties agreed to submit the

controversy to arbitration; that by agreement both parties and within the said

provided after the foregoing.

A jury was waived and the case submitted to the court.

The court found for the defendant and entered judgment for costs

against the plaintiff. The ruling of the court upon exceptions

of law submitted initiating the case was tested upon the theory

that the order upon which suit was brought had been rendered and

abandoned by mutual agreement of the parties. It appears that the

evidence tending upon the question of waiver of rights appellants.

The evidence tends to show without dispute that the

foregoing were manufactured and delivered under a written contract

of the foregoing, and that on December 13, 1920, the plaintiff

the plaintiff made demand upon the defendant for a

claim against defendant in order needs for delivery according to

$3,000.00 and authorized suit if the matter was not taken care of

by January 20, December 1920. The letter said: "Please get

up or come in, please and for Mr. Andrews." In response to that

letter Mr. Charles E. Gray called at the office of the attorneys,

and on the same day, December 21st, wrote a letter which Mr. Gray

very practically covered the conversation. This letter is substance

stated defendant's terms of the sale which the defendant, with

the writer

Plaintiff was informed of the delivery

he could not keep, and the letter continued: "It is apparent that our two companies will discontinue to do business from this point on, which is all right with us, and Mr. Hodson apparently wishes this to be the course of procedure on account of the action that he has taken with you, and it is entirely agreeable to us."
This letter further stated that defendant was willing to pay its bill in full as per statement at hand less defective materials; that it must insist upon being furnished with all the dies used for making the forgings, which it said defendant had previously paid for, and that the specification blanks provided that prices quoted on dies and tools represented 65% of their actual value and that they should remain the property of plaintiff until paid for by the customer. The letter continued:

> "We are very strongly of the opinion that we have paid in full for these dies up to date, and therefore feel that we must have them as a part of our final settlement.
> "To show that we are perfectly sincere in trying to comply with Mr. Hodson's ideas, we are enclosing herewith our check for $2,500.00 on account, and shall be very pleased to send him a check for the difference when this question is settled. The dies are no good to them in any way, shape or form, and the only thing that they can do with them is to destroy them, or throw them in the scrap. They are of some value to us."

On December 22, 1923, the attorneys for plaintiff replied, the material parts of the letter being as follows:

> "From our talk with Mr. West it would appear that the best thing for both parties, in the present circumstances, would be to go ahead and finish up the order. In view of the fact that there has been considerable work done upon the dies recently, and that there is a quantity of steel in the hands of the Great Lakes Forge Company, which was ordered last spring for your use, it does not seem feasible to cancel it outright. The Great Lakes Forge Company is ready to go ahead with the work, but at the same time it would like to have all matters in question adjusted as far as possible, and some assurance of more prompt payment given on future shipments.
> "We may add that there are two lots of steel in the hands of the Great Lakes Forge Company, which were ordered for your use. The first is a lot of high carbon steel, which was ordered especially for you when the order was first placed. Afterwards you found that the steel was too hard for your purposes, and you changed your specifications to a softer steel. In the meantime, this high carbon steel which was ordered specially for you is still on hand. The Great Lakes Forge Company has no use for it, and it is not possible to dispose of it. The cost price of this

he could not keep, and the latter continued: "It is apparent that our two companies will discontinue to do business from this point on, which is all right with us, as the things [illegible] [illegible] this is by the course of procedure on account of the action that he has taken with you, and it is entirely agreeable to us." This letter further stated that defendant was willing to pay the bill in full as per statement of [illegible] and made defendant's position; that it must insist upon being furnished with all the dies used in making the forgings, which it said defendant had previously paid for, and that the specifications should provide that prices quoted by them and [illegible] represented [illegible] of their actual value and that they should remain the property of plaintiff until paid for by the defendant. The letter concluded:

"We are very strongly of the opinion that we have paid in full for these dies as [illegible], and therefore feel that we must have them as a part of our final settlement.
"We know that we are perfectly [illegible] in trying to comply with Mr. [illegible] ideas, we are enclosing herewith our check for [illegible] on account, and would be very pleased to send you a check for the difference when this is [illegible] settled. The dies are no good to them in any way, [illegible], and the only thing that they can do with them is to destroy them, or [illegible] them to the scrap. They are of [illegible] value to us."

On December [illegible], 192[illegible], the attorneys for plaintiff replied, the material parts of the letter being as follows:

"From our talk with Mr. Hunt it would appear that the best thing for both parties, in the present circumstances, would be to go ahead and finish up the order. We wish to say that there has been considerable work done upon the dies already, and that there is a quantity of steel in the hands of the Great Lakes Forge Company, which was ordered last spring for your use. It does not seem feasible to cancel it outright. The Great Lakes Forge Company is ready to go ahead with the work, but at the same time it would like to have all matters in question adjusted as fast as possible, and some assurance of more prompt payment given on future shipments.

"You may note that there are two lots of steel in the hands of the Great Lakes Forge Company, which were ordered for your use. The first is a lot of high carbon steel, which was ordered especially for you when the order was first placed. Afterwards you found that this steel was too hard for your purposes, and you changed your specifications to a softer steel. In the meantime, this high carbon steel ordered especially for you is still on hand. The Great Lakes Forge Company has no use for it, and it is not possible to dispose of it. The scrap value of this

high carbon steel which remains on hand was $792.59. The Great Lakes Forge Company is perfectly willing to turn this steel over to you at cost; or, if you prefer, will charge you for it, and allow you its value as scrap. Its value as scrap will be about $110.00.

"The second lot of steel is some which was ordered for you last spring. This is the softer steel, which you are using regularly now, and which can be used in making up the wrenches to complete your order.***

"The Great Lakes Forge Company will, as a matter of course, take back and give you credit for any defective castings.***

"It appears that the cost of the dies was about $1,226.00, and the sixty-five per cent. which you paid amounted to $797.00, leaving a balance due of $429.00. We do not have the odd cents here, but these are practically the figures. On completion of the contract, the Great Lakes Forge Company will deliver these dies to you for $429.00; or, if you do not care to take them over, the Great Lakes Forge Company will retain them.

"We will be pleased to have Mr. Eddy stop in and see the writer at his early convenience, when he is down this way, and let us know what your conclusions are."

The evidence tends to show that on or about January 10, 1924, the Forge Company called up defendant and asked if defendant would take off their hands 1042 main frame forgings which had been made up but not delivered. The defendant agreed to, and on January 17, 1924, paid therefor the full invoice price of $166.64. Defendant complied with plaintiff's request and paid the 65% for the dies, according to plaintiff's terms. The evidence tends to show that after January 17, 1924, there was no further communications either oral or written between the parties until more than a year later, namely, February 13, 1925, at which time plaintiff, through its attorneys, wrote defendant, again on May 27th, and afterwards on June 9, 1925. In the last named letter plaintiff said:

"We wrote you on May 27th last regarding your contract with the Great Lakes Forge Company, which was made on May 14, 1923, for 120,000 Iron Forgings. We have not heard from you in reply.***

"It appears to us that the time has arrived for closing this matter up. If you want the forgings called for by the contract, the Great Lakes Forge Company will make them and deliver them to you. If you will not accept and receive the forgings, and will not give any delivery orders for them, such refusal on your part will be regarded by the Great Lakes Forge Company as a breach of the contract, and action will be taken accordingly.

"We are accordingly authorized by the Great Lakes Forge Company to notify you, and we do hereby notify you, that unless you notify the Great Lakes Forge Company, within the next three days, that you will accept and receive these forgings as called for by the contract, your failure to so notify the Great Lakes Forge Company will be regarded by it as a breach of the contract."

Prior to January 17, 1924, defective castings were returned, and it is admitted that defendant paid in full for all forgings manufactured and delivered by plaintiff prior to that date. In view of the correspondence between the parties and their subsequent conduct, we think the trial court was justified in finding as a matter of fact that the order upon which plaintiff sues had been mutually rescinded by the parties. The complete settlement for all of the goods delivered with adjustments allowed for the defective forgings, the request and agreement by which the defendant took and paid for the precise amount of forgings which plaintiff had manufactured, the silence of all the parties for more than a year concerning an order which in the usual course of business would have been completed in about three months from the time it was given, and the written correspondence between the parties prior to these settlements, are undisputed facts from which we think the court was justified in making that finding. Our conclusion upon this point makes it unnecessary to discuss the other questions argued as to the matter of damages, although on this point also, we think the views of the trial court were justified by the evidence.

For the reasons indicated the judgment of the trial court is affirmed.

AFFIRMED.

O'Connor and McCurely, JJ., concur.

Prior to January 15, 1951, defendants' records were returned, and it is admitted that defendant will in fact for all foreseeable consequences and intended to substantially prior to that date. In view of the correspondence between the parties and their subsequent conduct, we think the total court was justified in finding as a matter of fact that the other deed would substantially have been mutually rescinded by the parties. The conclusion certainly for all of the people involved with substantial claims for the defendant receipts, the payment and agreement by which the defendant paid for the [illegible] income of [illegible] which plaintiff had substituted, the efforts of all the parties to make [illegible] good substitution of money which is the [illegible] which [illegible] from [illegible] and the [illegible] between the parties which is those settlements, the [illegible] Plaintiff [illegible] for [illegible] justified in [illegible] [illegible]. The [illegible] which [illegible] is necessary to [illegible] the [illegible] of [illegible], [illegible] on the [illegible] [illegible], [illegible] which [illegible] of the trial court were justified by the evidence.

For the reasons indicated the judgment of the trial court is affirmed.

AFFIRMED.

Chapman and Sullivan, JJ., concur.

169 - 32110

247 I.A. 618

WILLIAM N. CUMMINGS,
Appellee,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff brought an action in case and filed a declaration of two counts, in which he alleged that while in the employ of the defendant, a common carrier engaged in interstate commerce, and in the course of his employment he received personal injuries on November 22, 1924, through the negligence of defendant in failing to comply with certain acts of Congress known as the Federal Employers' Liability Act and the Federal Safety Appliance Act. The defendant filed a plea of the general issue and there was a trial by a jury which returned a verdict of $75,000, upon which the court, over-ruling motions for a new trial and in arrest, entered judgment.

It was stipulated upon the trial that the defendant was liable, and the evidence introduced was directed solely to the question of damages. The only point urged for reversal is that the verdict is excessive and the result of passion and prejudice.

No evidence was offered in behalf of the defendant and the proof for plaintiff tends to show that at the time of the accident plaintiff was in the employ of the defendant as a freight conductor and "extra passenger man." Plaintiff was fifty-eight years of age. This was not his first accident. He says that he was at one time knocked between two cars by an overhead bridge but that he was not hurt; the date of this injury does not appear, but in 1911 the top grab iron on a car broke and let him fall back onto

the ground against the pilot of an engine and some brakes. At this time three ribs on his left side were broken and he was laid up for two or three weeks. His next accident took place in 1913, when a torpedo exploded and cut the eyeball of one of his eyes so that he has practically no sight in it; at the same time the end of his nose was cut off and a hole put through it, and he received scars on his face and head. After that accident he was away from work from January until June 4th following, after which he resumed active service. He is a large man, and at the time he received his injuries weighed from 195 to 197 pounds. At the time of the trial he weighed 200 pounds; he is about 5 feet 9¼ inches tall.

His earnings from November, 1924, to November, 1925, inclusive, show a salary which varies from $136.21 to $332.29.

Plaintiff lives in Blue Island and was injured November 28, 1925, at about 6:25 a. m. He was then acting as the conductor of a train of about 65 freight cars to which a caboose was attached. He was in the caboose, the train was moving easterly and he faced toward the west, watching, as he says, to protect his train from a through passenger train. He says:

> "The engineer ran by the switches and had to back up in order to head in the yards again. As he started to head in, the eyes of the draw bar, nine cars from the engine, pulled out of a Rock Island car, causing the train to go into emergency and throwing me backward against the steps that lead from the floor to the cupola of the caboose, with my back against it."

The train was moving from eight to ten miles an hour. The steps to the cupola led up to the center of the car and were about six feet from where plaintiff was standing. His back struck against the steps and he went to the floor. Coal and other stuff were thrown over him, but he managed to get up, whether with aid he is not sure. The passenger train was coming and he could see the headlight. Plaintiff says he was in great pain and started for home. He got off the train right then before it moved, and went up alongside of the train. He stepped down off the caboose

onto the ground and walked alongside of the train. He left his grip in the caboose and another employee threw it off when he passed the flagman. The caboose passed by plaintiff at the time the grip was thrown off and he had walked a distance of about two blocks by that time. His house was on Grove street in Blue Island about two blocks from the Rock Island tracks, and he walked home which was about 4½ blocks from the place where he was injured. His wife called Dr. A. E. Snyder, the Rock Island doctor at Blue Island, and took plaintiff to the St. Francis Hospital at that place. He was at the hospital at 7:25 a. m. and at ten o'clock X-ray pictures were taken.

Dr. Snyder ordered that hot water bottles be kept on plaintiff's back and directed that an alcohol bath be given him twice a day, which directions were followed and that was all that was done until four weeks later. Plaintiff was informed by Dr. Snyder that the X-ray pictures "showed nothing; that there was nothing wrong with my back; it was not broken and the alignment was all right." At the end of this time more X-ray pictures were taken and a body cast put upon plaintiff. These pictures were taken by Dr. Huntington at the hospital. The body cast was clear up under plaintiff's arms and clear down his hips. After the cast was put on he stayed at the hospital for 23 days and then went home. He wore the first cast 40 days in all. During a part of this time he was up and about. After the cast was taken off he received seven electrical treatments from Dr. Snyder, one every other day. For that purpose plaintiff went to Dr. Snyder's office, which was about 4½ blocks away from his home; he says, however, that he was not able to walk about at that time; that his wife took him to the office, but that he was able to get up to Dr. Snyder's office when he got over there in a car, and that in bad weather he called a taxicab. After the electric treatments another cast was ordered.

Plaintiff was sent to the office of Dr. Plummer, the

chief surgeon of the defendant company. Dr. Plummer was away and his assistant, Dr. Hanson, took care of plaintiff. By Dr. Hanson's orders plaintiff went to Dr. Potter's X-ray laboratory and three pictures were taken. Dr. Hanson ordered another cast put on, the same as the first one, and plaintiff stayed in the hospital ten days after that and then went home. Once after that time he went back and saw Dr. Snyder, about March 10, 1926. Afterwards he was sent by his attorneys to Dr. J. . O'Malley, who removed the cast and put a brace on him, and this brace plaintiff was wearing at the time of the trial. Dr. O'Malley also had three or four X-ray pictures taken at Vaughan's laboratory, and a few days prior to the trial another pictures were taken at Potter's laboratory. Plaintiff was sent to Potter's laboratory by Dr. Magnusen, a bone specialist, who testified as an expert in the case.

The testimony showed that plaintiff can get around when he has the brace on and that the brace gives him some relief, but he says that he cannot stoop over to put on or lace his shoes or wash his feet; that his wife does all that for him; that his back will not permit him to stoop; that he is stiff and sore right in the small of his back, right on the hip bone. When he went on the stand at the trial on April 28, 1927, he carried a cane and seemed to walk with a limp, and plaintiff said this was the way he walked all the time ever since he came out of the hospital, and instead of getting better it was getting worse; that at times some days it was better than others; that the trouble he suffered was due to pains in his back and nowhere else; that the pain was all over and not on either side of his backbone; that it came clear up in his neck and head and got into the right side of his head; that the pain in his head was not constant; that sometimes it would be for a week steady, then maybe he wouldn't have it for a week; that the pain in his back was right on the backbone at the coupling; that he bought a thermos light to use on his back, took

a prescription of tablets; that the thermos light was an electric light of 200-watt power and that it was to heat his back the same as a hot water bottle or an electric pad.

Plaintiff has not worked or attempted to work since he received his injuries. He testified that prior to the time of receiving the injuries he was in good health and condition and without any of the pains which he described.

Dr. Vaughan as a medical expert testified that he made his first examination of plaintiff on June 19, 1936, and that he discovered a well marked lordosis, that is, an incurving of his back in the lumbar or lower region, a spasm of the muscles on both sides of the spine, and a tenderness which was not an objective symptom; that the spine was also deviated to the right at the lower lumbar region. Reading the x-ray pictures, he says:

> "We also see here the 5th, 4th, 3rd, 2nd and 1st lumbar vertebrae, and also the pelvis; the tube was in front of the patient, centered about opposite the interval between the fourth and fifth vertebrae. There are seen a healed fracture of the left transverse process of the fifth lumbar vertebrae; there is another fracture of the left lateral process of the fourth lumbar vertebrae. On the left transverse process of the third vertebrae there is a slight deformity, but not marked enough so that I would be able to diagnose a fracture just from that. The whole spine is tilted to the right side, and also twisted. One sees the twist because these spinous processes which lie right underneath the skin of the back would normally run right up in a middle line, but here they are seen to be twisted off to the left side as the whole spine is tilted to the right. The main part of the tilting seems to occur at the junction between the fourth and fifth lumbar vertebrae. Beside that there is also a twisting - a rotation of the vertebrae above this level, which appears from the fact that the dorsal spines are not in the mid-line as they should be. The other picture of the spine shows the same things and shows a little lifting fracture at the upper margin of the right hip socket at this point; that shows in both pictures."

Dr. Vaughan further testified that the pictures of June 26th indicated an old standing arthritis, which in plain language is articular rheumatism, and he said the effect of violence upon such an arthritic condition would be to hasten the progress of the disease; that many people have the beginning of arthritis at the age of forty years; that they may have it without

pain or discomfort or any of the disabilities and be unaware of it. In response to a hypothetical question, he stated that, assuming the facts to be true, it was his opinion, "based upon a medical certainty, and from a reasonable and probable standpoint, that the injury was sufficient to have produced the results assumed. Assuming the hypothetical facts to be true, I think the condition is permanent." He also stated that the spinous processes were healed, and when asked on cross-examination to state, such being true, what else there was about the plaintiff that was not healed, the witness replied: "His spine is still tilted and twisted, and he has an exaggeration of his chronic arthritis." He further testified that an accident such as occurred would produce such a tilting as found if the muscles were torn on one side; that the muscles on the other side became predominant and would hold the spine over on that side and tend to maintain it there. This witness said that in his opinion the prior injury which plaintiff sustained in 1913, when his ribs were broken, would not suffice to produce the tilting of the character found; that the rotation tends to but does not always accompany a tilted spine; that the rotation in plaintiff's case was about one-third of a right angle; that arthritis was not unusual in people approaching sixty years of age; that it was a progressive trouble and difficult to arrest; that whatever disability resulted from the accident was due primarily and principally to the spraining of the muscles or the breaking or tearing or stretching of the muscles, rather than to the fracture of the spinuous process. The witness explained that when he spoke of the condition as permanent he meant the spinal deformity was permanent, the tilting of the spine to the right, in line with rotation, and the arthritis were permanent.

In response to a similar hypothetical question Dr.

Magnusen testified that an injury which was severe enough to fracture the transverse processes due to a direct blow was severe enought to cause the symptoms which a man, in the condition plaintiff was in, would have. This witness further said that an arthritic spine healed more slowly than a normal spine in a large majority of cases; that after a man passed fifty years it did not heal as fast as before he was thirty years old; that plaintiff's condition was sufficient to cause pain; that the muscle spasm was simply an evidence of nature trying to protect the sore area; that it was different from the involuntary hardening of the muscles; that it was not possible for a man to harden one of a group of muscles and not harden the others, and that this was due to rotation from somewhere along the path of the nerves; that whether the condition would remain as it was or get progressively worse depended largely on conditions; that he had seen them get better even in a man of plaintiff's age; some stayed the same and some got worse; that he thought that with rest in bed and support under the lumber region and traction on the legs and prolonged rest, the man would probably have some improvement; that the condition of such a man as plaintiff would prevent him from actively engaging in railroad service. He said: "If these ligaments get well, the man is well, because the disability is now in the ligaments; the bone is healed. It is always true that the bones heal long before the ligaments do. This man's troubles are in the ligaments alongside the backbone; so far as the bone is concerned, it is united." He further said that chances were that it would stay about the same as it was; that with treatment it might improve some; that without treatment it might get worse.

In support of its contention that these damages should be regarded as excessive by this court, the defendant has cited three cases. In the first case, Central of Ga. Ry. Co. v. Robertson, 91 So. 470, which was decided by the Supreme court of Alabama,

October 27, 1931, the plaintiff was a young man twenty-one years old. There was evidence of a fracture of one of the transverse processes of the vertebrae, and the plaintiff testified that he still had pain there when he bent over. In that case a verdict for $19,000 was reduced by the Supreme court to $1[illegible],000. However, it appears that the plaintiff was able to work and earn wages as a bookkeeper, while in this case the evidence tends to show a total disability.

The second case cited is Brock v. C. R. I. & P. Ry.Co., 266 S. W. 692. The evidence in that case showed injuries somewhat similar to those which appear here but which were far more severe in character, and the Supreme court of Missouri held that a verdict of $20,000 was not excessive. Whether the court would have sustained a much higher verdict does not appear.

The third case cited is Kowalski v. C. & N. W. Ry. Co., 199 N. W. 178, decided by the Supreme court of Minnesota. The plaintiff in that case, after he received his injuries, testified he could do no work because he could not use his right leg. He walked with crutches and wore a leather corset and complained of pain in the small of his back. A medical expert testified that two of the lumbar vertebrae were tipped out of line and cracked, causing a callus to form which pressed on the nerves at the point of the injury; that respondent's right leg was numb and weak and could not be moved without pain; and that the muscles of that leg had become permanently weakened. The medical expert, however, admitted on cross-examination that except in a general way he could not tell how much permanent disability there was, and added that future improvement was to be expected. In that case a verdict of $15,000 was reduced by the Supreme court of Minnesota to $10,[illegible]. It is apparent that the court in that case was convinced that the pain and injury were largely feigned. If we were convinced that

such was the fact here, we would not hesitate to require a remittitur in this case. But we are not able to say that much is the fact. At the time of plaintiff's injury and for weeks subsequent thereto, he put himself entirely in the care of physicians and surgeons who were employed by the defendant. If he were feigning, we think it apparent that he would not have pursued this course. Moreover, these physicians and surgeons were not called as witnesses nor was there any attempt to excuse their absence. We cannot shut our eyes to the fact that if the injuries of plaintiff were assumed, the opportunity to detect that fact was accessible.

The defendant insists that at any rate plaintiff's working days were about over; that a man fifty-eight years of age who had suffered injuries such as plaintiff sustained therefore, could not expect to perform services of the kind required in railroading much beyond his sixty-fifth year. No evidence, however, was introduced tending to show this fact, if it is true. The life expectancy of plaintiff, according to the tables, would be more than an additional sixteen years, and while it is very improbable that plaintiff, in the absence of the injury which he sustained, would have been able to continue his services for that length of time, we do not find any evidence in the record tending to fix the date that would mark the dead line. We are referred by the reply brief to an article entitled "The Old Age Problem," by Dr. John O'Grady, which the brief informs us is embraced in the report of the Ohio Health and Old Age Insurance Commission, published in February, 1919, and it is said that the author, employing the usual process of averages, appears to fix sixty-five years as the practical limit of the working life of a man. The report of the Pennsylvania Commission on Old Age Pensions, 1919, p. 145, is also cited, with this statement:

> "Men in modern transportation systems are subject to greater hazards and wear out more rapidly than in many other branches of industry."

such was the fact even; we would not hesitate to regard a Pasteur as in some sense. But we are not able to say that much of the fact, in the view of plausibility in layman and the basis substantial theory, be yet clearly written in the book of physicians and surgeons who were analyzed by his interest. If he were religious, we think it somewhat that he would not have pursued this course. Moreover, these physicians and surgeons were not called on witnesses nor was there any attempt to change their opinions. To conclude that our case in the few lines if his lectures of 19-nothing were issued, the appearance is based upon fact the assertion.

The delusional insight that at any rate plausibility's nothing like this work over, that a few life-saver pass at the 90s had suffered injuries was so similarly nonsolved inconclusive, would not repeat to prolong notoriety of the sick requires in fall-reading much beyond his sixty-fifth year. In science, however, has introduced terrible to such risk that, if it is true. The life expectancy of plausibility, according to the insane, would be more than an additional eighteen years, and while it is very improbable that plausibility, in the absence of the injury which he mentioned, would have been able to continue his services for this length of time, we do not find any evidence in the record leading to fix the date that would mark the dead line. To use referred by the sane lived in an article entitled "The old age problem," by Dr. John Stuart, which the brief between us is entrusted in the new part of the Title Fifteen and 150 Age Insurance Commission, pathical 22 February, 1928, and it is well that the author, employing the usual process of analogy, appears in its sixty-five years as the president Ladd of the working life of a man. The report of the Phenomenals Commission on the age Insurance, 1919, p. 149, is also clear, with its statement:

> "Men in modern industrial nations are subject to greater hazards and have not more troubly than in many other branches of industry."

A paper read by Dr. Louis I. Dublin, statistician of the Metropolitan Life Insurance Company, before the Medical Association of Greater New York, in February, 1917, is also mentioned. From this paper the following is quoted:

> "For the purposes of this discussion I shall set age sixty-five as the threshold of old age. This is in general agreement with the best custom, for it is at this point that the rates of mortality and morbidity both show a decided increase."

The opinions of these experts, however, are not in evidence. This appeal must be considered on the record made in the trial court. The amount of damages to be allowed in cases of this character is peculiarly within the province of the jury, which has advantages in seeing and hearing the witnesses which a court of review does not possess. We have often, on questions of this kind, pointed to the fact that the purchasing power of the dollar has decreased materially in recent years. How many years of life may be left to the plaintiff we may not know; but the evidence in this regard tends to show, without an attempt on the part of the defendant to dispute it, that this plaintiff's active life and his ability to provide for his wants and those of his family, have been ended by this accident, for which the defendant admits it is at fault. The damages cannot be ascertained by any mathematical computation. Defendant does not suggest what amount would compensate plaintiff for the pain which he has suffered. The evidence indicates that in the future plaintiff will need medical care, nursing and attention. Indeed, it is not impossible that the very fact that his injuries have incapacitated him for hard manual labor may prolong the years of his helplessness. If we assume that without this accident he might have enjoyed ten years of active service, with the ability to earn the amount which he usually received, his compensation would have brought him more than the amount of this verdict. This court does not usurp the functions of a jury. The rule of law is that we may reverse only when the

judgment entered is manifestly erroneous. That is not the situation here.

The judgment is therefore affirmed.

AFFIRMED.

O'Connor, J., concurs.

McMurray, J., dissents.

187 - 32128

247 I.A. 618

M. BOYAJIAN,
Appellee,

vs.

CHARLES V. CHATMAS,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant in case and filed a declaration of one count which was in form for the conversion of certain goods and fixtures alleged to be the property of plaintiff.

The defendant filed a plea of the general issue and afterwards a special plea justifying the taking of the goods and chattels under powers given by a chattel mortgage.

There was a trial by jury and a verdict for $2,000. After a remittitur of $200 the trial court over-ruled motions for a new trial and in arrest and entered judgment for $1,800. With other points, the defendant urges for reversal that the verdict is manifestly against the evidence. The material facts are not complicated and some of these not disputed.

On September 24, 1924, the defendant by written lease demised to the plaintiff a storeroom located at 3601 Fullerton avenue, Chicago, "to be occupied for retail confectionery store and ice cream parlor, lunch counter, cigars and tobacco, and for no other purpose whatsoever." The lease by its terms was to begin on October 1, 1924, and to expire April 30, 1929. The agreed rental for the term was $8078, payable in monthly instalments of $125 up to and including April 1, 1925, and $130 to and including May 1, 1925, for the balance of the term. The monthly rental was payable in advance on the first day of each and every month of the term, and time was expressly made of the essence of the agree-

167 - 8328

B. Petition.

Appellee,

vs.

CHARLES V. GRAVES,

Appellant.

APPEAL FROM SUPREME COURT
OF NEW YORK.

MR. CHRISTIAN FLETCHER ARGUED
THE CAUSE AS AMICUS CURIAE.

Plaintiff had determined to lease his field a hundred rains of one acre which was in turn for the construction of new well lands and Graves claims to be the property in plaintiff.

The defendants filed a bill of the general issue and afterwards a special plea justifying the entry of the lands and exercise under powers given by a covered mortgage.

There was a trial by jury and a verdict for $3,000. After a verdicture of $300 the trial court ordered judgment for a new trial and in default and upheld judgment for $3,000. With ethic notice, the defendant appeal for reversal that the verdict is unjustifiably against the evidence. The essential facts are not complicated and come to issue for instance.

On December 21, 1911, the defendant by written lease leased to the plaintiff a reservoir located in Cody Reservoir Estate, Alleson. It is suitable for small manufacturing plant and low power petrol, lumber counter, storage and lessees, and for no other purpose whatsoever." The lease by its terms was to begin on October 1, 1911, and to expire April 14, 1912. The agreed rental for the term was $8250, payable in monthly installments of $275 up to and including April 1, 1912, and $300 in and including May 1, 1912, for the balance of the term. The monthly rental was payable in advance on the first day of each and every month of the term, and time was expressly made of the essence of the agreement

ment.

On the same day, as part of the same transaction, the defendant made a loan to plaintiff of the sum of $125 in cash, and plaintiff executed and delivered to defendant a judgment note of that date for the sum of $1,000 by its terms due on or before October 1, 1925. The consideration in part for this note was the $125 advanced, and the balance of $875 represented the first seven months rent which would accrue under the terms of the lease.

On the same day the plaintiff executed and delivered to defendant a chattel mortgage in and by which he sold and conveyed to the defendant certain goods and chattels therein described. The mortgage was in the usual form, conditioned for the payment of the note of $1,000 "on or before October 1, 1925," with interest at the rate of seven per cent per annum after maturity, and was to become void upon the payment of the note.

The mortgage provided that the mortgagor might retain possession until he should make default in the payment, and the mortgagor covenanted that in case of such default, "or if the mortgagee, his executors, administrators or assigns, shall feel himself insecure or unsafe or shall fear diminution, removal or waste of said property; or if the mortgagor shall sell or assign, or attempt to sell or assign, the said goods and chattels or any interest therein; or if any writ, or any distress warrant shall be levied on said goods and chattels, or any part thereof," then the note should, at the option of the mortgagee, without notice of the option to anyone, become at once due and payable; that the mortgagee might take immediate possession of the property, and for that purpose might pursue the same wherever it might be found and might enter any of the premises of the mortgagor with or without force or process of the law, wherever the goods and chattels might be, or supposed to be, and search for the same, and if found, to take possession of, remove, sell and dispose of the property, or any

ment.

On the same day, as part of the same transaction, the defendant made a gift to plaintiff of the sum of $[illegible] in cash, and plaintiff endorsed and delivered to defendant a promissory note of that date for the sum of $[illegible] by the terms thereof payable on demand, [illegible] October 1, 1970. The consideration in part for this note was the gift mentioned, and the balance of $[illegible] represented the first seven months rent which would accrue under the terms of the lease.

It has been the practice [illegible] the delivery to defendant a similar mortgage in lieu of rent on such premises, [illegible] the defendant certain cash advances during the [illegible] period. The mortgage was in the usual form, conditioned for the payment of the note of $[illegible] "on or before October 1, 1970," with interest at the rate of seven per cent per annum after maturity, and was to become void upon the payment of the note.

The mortgage provided that the mortgagor shall pay [illegible] taxes [illegible] the mortgagee [illegible] the mortgagee, and if the mortgagee, his executors, administrators or assigns, must [illegible] financial interests or needs or risks for duplication, renewal or waste of mail receipts; or if the mortgagor shall sell or assign, or attempt to sell or assign, the real estate and premises or interest; or if any writ, or any distress during such [illegible] levied on such goods and chattels, or any such [illegible], then the note should, at the option of the mortgagee, without notice of the option to mature, become at once due and payable; that the mortgagee might take immediate possession of the property, and for that purpose might enter the same whenever it shall be found and sight enter any of the premises of the mortgagor with or without force or process of the law, whatever the legal and civil rights may be, or supposed to be, and remove the same, and at large, to take possession of, remove, sell and dispose of the property, or any

part thereof, at public auction, to the highest bidder, after giving three days notice of the time, place, and terms of sale, together with a description of the property to be sold, by notices posted up in three public places in the vicinity of such sale, or at private sale, with or without notice, for cash or on credit, as the mortgagee might elect.

Boyajian, the mortgagor, paid the rent for the premises for the months of May, June and July, 1925. He did not pay the rent on August 1st nor any day thereafter, although he was several times requested to do so. A preponderance of the evidence indicates that the business of plaintiff did not prosper; that on several occasions it was closed during business hours; that the stock was run down and part of it was being removed, and that plaintiff was offering the business for sale.

Under these circumstances the defendant procured the Sheriff of Cook county to foreclose the chattel mortgage and Sievert, a deputy sheriff, took possession of the store by virtue of the mortgage on August 20, 1925. A written notice was that day served upon the plaintiff, Boyajian, in substance reciting that the mortgage theretofore given by him was foreclosed and that the sale under the mortgage would be held at 3601 Fullerton avenue on August 24, 1925, at ten o'clock a. m.

On the same day the deputy sheriff, as agent for the defendant mortgagee, made out and posted three notices of sale, and the record shows that one of these written notices was posted on the front door of the store, one on the side door, one in the alley on a telegraph pole, and one at the County Building. One of these written notices was handed to the plaintiff, Boyajian, on the following day, August 21st.

The evidence also indicates that the sale was held at the time and place described in the notice; that about fifteen

part thereof, is public property, in the Almanac sense, after living there five months of the year, or, at most, two years of age, leaving with a presumption of the property to be his, by reason being of the same public place in the vicinity of such sale, or of private sale, with or without bailee, for good or ex tortio, or the mortgage right thereof.

Similar, the mortgagee, gill for rent for the premises for the months of July, June and July, 1899. He did not lay the rent on Mount Ligon and the interest, claiming to not exceed three months's rent in ex. A preponderance of the evidence indicated that the tenancy of plaintiff in his property ceased at sunrise, and the defendant in the closed door, bailee lease, that the door was too dark and wet of it was bitter, however, the tenancy was effected, the tenancy for sale.

Under these circumstances the defendant accepted the property of Sara Conry to foreclose the mortgage, and thereby a deputy sheriff, took possession of the place by virtue of the mortgage on March 9, 1899. - [illegible] [illegible] was [illegible] and [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] August 9, 1899, in an action [illegible].

To put Sara in the lease security, as such for the Saturday morning, was not until five months after July, and the record shows that one of these witness notices was posted on the front door of the house, and on the plaintiff, and in the city as a property owner and on of the [illegible] [illegible]. In of that written notices was [illegible] to the [illegible], [illegible], on the following day, August 11th.

The evidence also indicates that the city was but in the time and place described in his notice; that these [illegible]

persons attended; that the articles which had been taken were offered separately and afterwards in bulk, and that the best price offered was by the defendant, to whom the property was sold for $850. The deputy testified that on the same day he handed a written statement of the proceeds of the sale to the plaintiff.

The controlling question in the case is whether defendant mortgagee was justified under the evidence as disclosed in feeling unsafe and insecure, and for that reason taking possession of and selling the property covered by the mortgage before the note was due according to its terms.

Whatever the law may be in other states, it seems to be the settled law of Illinois that the mere declaration of a mortgagee that he feels unsafe and insecure is not conclusive. It must not only be made to appear that he actually felt insecure, but also that he acted in good faith and had probable cause or reasonable grounds for so deeming himself unsafe and insecure. That is the law which the Supreme court laid down (distinguishing prior cases) in Roy v. Goings, 96 Ill. 367, and that decision has been followed by the Supreme court in the later case of Hogan v. Akin, 181 Ill. 448, and by the Appellate court of the second district in Tanton v. Boomgaarden, 111 Ill. App. 37.

As tending to show that defendant foreclosed the mortgage in bad faith and without probable cause, plaintiff testified that defendant offered to pay him $850 to surrender his lease and afterwards offered him $5,000 for the fixtures, stock, and the surrender of the lease. He says this offer was made on August 10th, and that after being unable to effect a deal of that sort, appellant on August 20th caused the property to be seized. This contention rests, however, upon the testimony of plaintiff only, which is entirely inconsistent with the testimony of other witnesses, and is, we think, most im probable in view of the uncontradicted facts. Indeed, plaintiff did not take the stand in rebuttal and leaves

persons attended; that the articles which had been taken were offered separately and afterwards in bulk, and that the last price offered was by the defendant, to whom the property was sold for $800. The deputy testified that on the same day he handed a written statement of the proceeds of the sale to the plaintiff.

The controlling question in the case is whether defendant mortgagee was justified under the circumstances disclosed in taking unsafe and insecure, and for that reason taking possession of and selling the property covered by the mortgage before the note was due according to its terms.

Whatever the law may be in other states, it seems to be the settled law of Illinois that the mere declaration of a mortgagee that he feels unsafe and insecure is not conclusive. It must not only be made to appear that he actually felt insecure, but also that he acted in good faith and had probable cause or reasonable grounds for so deeming himself unsafe and insecure. That is the law which the supreme court laid down (distinguishing prior cases) in Hoy v. Goinns, 96 Ill. 587, and that decision has been followed by the supreme court in the later case of Koren v. Ahlm, 138 Ill. 447, and by the Appellate court of the second district in Tanner v. Bournemouth, 111 Ill. App. 87.

As Taylor is also that defendant foreclosed the mortgage in bad faith and without probable cause, plaintiff testified that defendant offered to pay him $800 to surrender his lease and afterwards offered him $5,000 for the fixtures, stock, and the surrender of the lease. An oral bids offer was made on August 10th, and that after being unable to effect a deal of that sort, proceeded on August 20th counted the property to be seized. This contention rests, however, upon the testimony of plaintiff only, which is entirely inconsistent with the testimony of other witnesses, and is, we think, most improbable in view of the uncontradicted fact. Indeed, plaintiff did not take the stand in rebuttal and leaves

evidence uncontradicted to the effect that he had no money; that he had taken in but fifty-five cents in the business on the day of the foreclosure; that the store had been closed during business hours and had almost ceased to do business; that he himself asked that a five days notice should be served upon him for the purpose of terminating the lease; that he had advertised the place for sale in Greek newspapers and told defendant that he could not get a purchaser. The whole record indicates that any man of ordinary business prudence and sagacity would have felt insecure and unsafe as far as the property covered by this mortgage and the indebtedness represented by the note it secured were concerned.

We might add that the plaintiff does not seriously contend that actual damages to the amount of this judgment were sustained. On that point he cites cases to the effect that exemplary damages may be awarded where an injury complained of is done wantonly and wilfully. The declaration does not aver wilfulness or wantonness, nor is there evidence in the record which would justify the infliction of any such damages if it had been so averred. The plaintiff also testified that property not covered by the mortgage was taken but does not deny evidence to the effect that after defendant took possession he obtained property demanded without giving any receipt for it. Counsel for plaintiff suggests in his argument in this court that plaintiff was evicted by defendant and his henchmen "breathing fire from their nostrils." Perhaps the verdict of the jury can be accounted for on the theory that counsel succeeded in impressing upon the minds of the jury his own views in this regard.

The verdict is against the preponderance of the evidence, and a new trial should have been granted for that reason. The judgment is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor and McSurely, JJ., concur.

20 - 31691

247 I.A. 618[5]

GENERAL MOTORS ACCEPTANCE CORPORATION,
Defendant in Error,

vs.

ED. SIMMONS,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this writ of error the defendant questions an adverse judgment for $334.36 entered upon a trial by the court of an action in replevin with a claim in trover.

It is first said that the court failed to fix a time for the trial of the case, as required by Section 45 of the Municipal Court act. This was unnecessary, as the record shows that on January 20, 1927, when the case came on for trial in regular course, the parties were present and the record recites the hearing of evidence and the argument of counsel. Also a motion was madeon the same day by the defendant, who is an attorney at law and appeared per se, to vacate the finding and judgment, which motion was continued until February 10th. February 15th the defendant filed a petition asking that the judgment be vacated, from which it appears he was either present or was represented upon the trial of the case on January 20th. In his brief he admits that he was present at the trial, although objecting thereto. The purpose of the statute requiring that the time of the trial be fixed is that the parties may be informed, but when both parties are before the court and go to trial, neither can complain that no order was entered setting the case for trial. Furthermore, this point was not raised in defendant's petition to vacate the judgment, but it is raised for the first time in this court. It can not be entertained. Goode v. Illinois Trust & Savings Bank, 121 Ill. App. 161; Herrington v. McCollum, 73 Ill. 476; Brownmark v. Livingston, 100 Ill. App. 474.

The court properly denied the petition to vacate the judgment. It was defective in failing to state any good reason why defendant did not proceed with the trial. The only thing approaching a reason is the allegation that he was engaged in another court, but he does not state that he was engaged in the actual trial of a case. Furthermore, the petition is faulty in not presenting any meritorious defense. Roberts v. Corby, 36 Ill. 182; Eggleston v. Royal Trust Co., 205 Ill. 170.

February 13th by a clerical error an order was entered which read: "Now comes the plaintiff and moves the court that the judgment and finding of January 20, 1937, be vacated and set aside, which motion the court over-rules." Manifestly, the plaintiff made no such motion, but the defendant did, and within the term this order was corrected so as to correspond with the fact. This correction was properly made and within the power of the court. People v. Holmes, 312 Ill. 284.

Defendant complains because he was not present at the time the court disposed of his petition to vacate the judgment. The record is silent in this respect, but it is shown that the court ruled upon the petition pursuant to a notice served by plaintiff's attorneys upon the defendant, the receipt of which was acknowledged by him.

No good reason appears for reversal and the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

40 - 31969

247 I.A. 619

PHILIP EDELBERG,
Plaintiff in Error,

vs.

SAMUEL M. EDISON,
Defendant in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff seeks the reversal of a judgment against him in an action tried by the court. His statement of claim alleged a breach by defendant of the following contract:

"Mr. Philip Edelberg,
127 N. Dearborn St.,
Chicago, Illinois.
Dear Sir:

In consideration of your purchasing the Twenty-five (25) One Thousand Dollar ($1,000.00) bonds of the Broadway Halsted Building Corporation, numbered two-hundred sixty-five (265) to Two-hundred eighty-nine (289) both inclusive, and due March 15th, 1938, the undersigned agrees to re-purchase said bonds at the par value thereof, on September 15th, 1925, provided, however, that you are the owner of said bonds on September 15th, 1925.

Broadway Halsted Building Corporation
By Dr. Samuel M. Edison,
President.

In consideration of One Dollar ($1.00) and other good and valuable considerations, the receipt of which is hereby acknowledged by Samuel M. Edison, I do hereby unconditionally guarantee the payment of the said sum of Twenty-five Thousand Dollars ($25,000.00) on September 15th, 1925, of the said Broadway Halsted Building Corporation, to be performed as above set forth, and I hereby waive all notices required to be given in connection therewith, but agree to pay on demand said sum of Twenty-five Thousand Dollars ($25,000.00), in payment for said bonds, numbered two-hundred sixty-five (265) to Two hundred eighty-nine (289) both inclusive, on said above mentioned date.

Dr. Samuel M. Edison.

Witness:
Lewis D. Levit."

Plaintiff contends that the finding is contrary to law and to the weight of the evidence. Defendant seeks to support the judgment on the ground that plaintiff did not make a tender of the bonds on September 15, 1925, the date mentioned in the writing.

The evidence tended to show that plaintiff and de-

fendant had a conference on that date at which defendant stated in substance that he had approximately $11,000 in checks with which to make good his guaranty of the purchase by the Broadway Halsted Building Corporation of the bonds at the par value of $25,000. It appears that at a former trial he testified that he had only $8,500 with him at the time. Plaintiff testified that the certificates of stock were with his bank for safe keeping and that he could have obtained physical possession of them in five minutes. Defendant's argument is that, because plaintiff did not physically offer the bonds to him on September 15th, therefore defendant was not in default.

The law does not require a useless tender. Defendant by his own admission was prepared to pay less than half the amount he had guaranteed to pay, and an actual physical tender of the bonds would have been useless. Subsequent to this date there were repeated tenders of the bonds, but defendant declined to pay for them.

The fact that the interest coupons on the bonds were clipped and collected is not material as affecting the primary issue. It also should be noted that under the terms of the agreement defendant waived all notices and that his guaranty was unconditional. He could avoid the obligation only by tender of the full amount under his agreement, and this it is conceded he did not do.

The finding of the trial court was based upon a misapprehension of the law, and its judgment is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and O'Connor, J., concur.

Tenant had a conference on that date at which defendant stated in substance that he had approximately $11,000 in stocks with which to make good his guaranty of the purchase by the Engineering Building Corporation of the bonds at the [illegible] value of $15,000. It appears that at a former trial he testified that he had only $8,000 with him at the time. Plaintiff testified that the [illegible] of these bonds were with him [illegible] and that he could have obtained physical possession of them in five minutes. Defendant's argument is that [illegible] was purchased after the bonds [illegible] in September 1931, therefore defendant was not in default.

The law does not require a useless tender. Defendant by his own admission was prepared to pay $15,000 [illegible] he had guaranteed to pay, and an actual physical tender of the bonds would have been useless. Defendant [illegible] to take those bonds [illegible] and defendant declined to pay for them.

The fact that the [illegible] bonds were pledged and delivered is not material [illegible] the primary issue. It also should be noted that under the terms of the agreement defendant waived all notices and that his liability was unconditional. He could avoid the obligation only by tender of the full amount under his agreement, and this he admitted he did not do.

The finding of the trial court was based upon a misapprehension of the law, and the judgment is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and O'Connor, J., concur.

69 - 32007

247 I.A. 619

MARY KULEWICZ, Defendant in Error, vs. WALTER GLADENIS, Plaintiff in Error.	ERROR TO SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff charged defendant with wrongfully assaulting and beating her and upon trial by a jury had a verdict for $1100, upon which judgment was entered and which defendant seeks to have reversed.

Only two witnesses testified to the occurrence - the plaintiff and the defendant. Plaintiff lives with her husband about two and a half blocks from where defendant lives with his wife. Plaintiff testified through an interpreter that on an evening in August, 1923, about nine o'clock, she was looking for her cow, and in passing defendant's house she saw her husband sitting there with the defendant; that she went into the house and speaking affectionately to her husband requested him to go home with her; that thereupon the defendant struck her in the back and threw her downstairs, chased her out of the house, chased her all the way down to 55th street and kept on beating her for about half a block; that she did not make any outcry as she "had no chance to do any hollering because he always knocked me down." She said that she could not count the number of times the defendant knocked her down; that when defendant first hit her, her husband disappeared; that her husband is a large man weighing one hundred seventy-five pounds; that her husband took her home; that the defendant hit her on the back and threw her down stairs, but she later testified that he did not hit her while in the house, but hit her after he had pushed her out of the house and that he started

BLACK COMMITTED,
Defendant in error.

vs.

BAILIE CLARKSON,
Plaintiff in error.

ERROR TO SUPREME COURT
OF WEST VIRGINIA.

MR. JUSTICE BRADLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant in a justice's court in Pocahontas County, and obtained judgment for $100 and costs. Defendant appealed to the circuit court of that county, where the case was tried by a jury and a verdict for $100, upon which judgment was entered and which defendant moved to have reversed.

The only allegation material to the controversy - the plaintiff was for sale or hire. Plaintiff lives with her husband about two and a half miles from Green Bank and lives with his wife. Plaintiff testifies through an interpreter that on a week-ing in March, 1870, about nine o'clock, she was leaving her hus-cow, and in passing defendant's house she saw his husband sitting there with the defendant. She did not know her husband intended affectionately to her husband's conversation; he is a man with her; that thereupon the defendant struck her in the face and threw her downstairs, closed her door, and left the house, where for six hours she dare to come out. Her husband was detained for her about half a hour; that she did not make any money on the "road on duties to be any hoisting because he always insisted on doing." She will have she shall not visit the house of the defendant because she knows that man dangerous; that her husband is a large and religious man, and is seventy-five years; that her husband lives near. Her husband testified that her on the back and force her from home, for she also testified that he did not let her walk in the house, but she her arms be her mother and her husband and that he started

to "beat her up" as she fell down the stairs on the ground.

There are inconsistencies and some highly improbable features in her story. It is difficult to believe that during the half block or more when, as she says, defendant was striking and kicking her, she made no outcry.

Defendant testified that he was a waiter employed at the Union League Club for six years and before that had been employed for seven years at the Chicago Athletic Club as a waiter. He testified that he never had anything to do with plaintiff; that sidewalks had been built in front of his property and the property of plaintiff and her husband; that the company supplying material for the walk had filed a mechanic's lien against both pieces, and Kulewicz, plaintiff's husband, came over to defendant's house to talk over the matter. Defendant puts the date as Sunday, August 20th. There were present in the kitchen at this time Kulewicz, defendant's wife and the defendant. Defendant says that Kulewicz had been there only seven or eight minutes when plaintiff ran in the front door and struck her husband about five or six times in the face and the husband went out the back door; that defendant remonstrated with plaintiff but she said, "If you don't shut up I'll give you the same." Defendant then opened the door and told her to get out and she did. Defendant denies that he ever struck her and says that he never touched her in any manner or fashion; that he never knocked her down or chased her out of the house. Plaintiff testified that when she looked through the window she saw that her husband was drinking whisky. Defendant denies this, saying that they did not have anything to drink; that there was no drink there.

Defendant put his wife on the stand to testify as to the occurrence, but on objection the court, following the statute disqualifying the wife under such circumstances, held her incompetent. Thus adding one more instance to the many where this

factitious rule has hindered justice by helping to hide the facts. See Wigmore on Evidence, 2nd ed., vol. 1, p. 1031.

A physician who examined the plaintiff testified that he found a number of bruises on her body. There is ample evidence that she received serious bruises from some source which caused her to suffer a miscarriage. The doctor testified that he first examined her and found the bruises on August 13th, which would be a week prior to the date given by defendant as the time when plaintiff called at his house. Plaintiff did not fix the date; this was assumed in the question of her attorney.

It is very difficult to believe that defendant with no provocation would so brutally assault a woman whom he scarcely knew. It is evident that plaintiff was angered at the long continued absence of her husband while she was unsuccessfully hunting for their cow. We can understand her displeasure with him, and it would not be improbable that he and his wife subsequently had some altercation over the matter.

There were errors on the trial which necessitate a reversal. Upon cross-examination plaintiff was asked whether she requested her husband to help her when defendant was beating her, and objection to this was sustained. She was further asked what her husband did, if anything, at the time; objection to this was sustained; also she was asked whether her husband remained in defendant's house during all the time in question; objection to this was sustained. She was further asked on cross-examination whether, after each time she was knocked down and kicked, she got up and ran, to which objection was sustained. The witness should have been allowed to answer these questions as tending to test the accuracy and truthfulness of her testimony in chief.

Upon consideration of the record we are not content to allow the judgment to stand. It is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and O'Connor, J., concur.

traditions rule was blindness justice by judges to rule the Jews. See Wigmore on Evidence, 2nd ed., vol. 1, p. 1823.

A physician who examined the deceased testified that he found a number of bruises on her body. There is ample evidence that she received serious injuries from some source which caused her to suffer a miscarriage. The defendant testified that on first examined her and found she received on August 13th, which could be a reply prior to the date alleged by defendant to her also than qualifiedly said on his person. Similarly he had left the body; this was assumed in the question of her alibiness.

It is very difficult to believe that defendant with an provocation would so brutally assault a woman who he recently knew. It is evident that jealousy was engrained of the long sustained absence of her husband while she was successfully fulfilling her trade. It was undoubtedly the disappointment that, had it would not be improbable that he had left prior definitely had been alleviated over the matter.

There was strife on the trial with considerable a previous. Upon cross-examination plaintiff was asked whether she requested her husband to give her an alibi, defendant was forbidding her, and objection to this was sustained. She was further asked what her husband did, if anything, at her place, objection to this was sustained; also she was asked whether her husband resulted in defendant's house during at the time in question objection to this was sustained. She was further asked in cross-examination whether after each time she was assaulted from and August, she did or not run, to which objection was sustained. The witness should have been allowed to answer these questions as having to test the accuracy and truthfulness of her testimony in chief.

Upon consideration of the record in our opinion, we are unable to alter the judgment in error. It is therefore affirmed and the cause remanded.

BRUNER, J., DISSENTING.

Bainbridge, C. J., and Gibson, J., concur.

90 - 32030

247 I.A. 619[3]

CORA C. MAYELL,
Appellee,

vs.

MAURICE E. DALEY and G. LYNN OSMER, jointly and severally,
Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendants ask for the reversal of a judgment against them for $1,[illegible] entered upon the verdict of the jury in the trial of an action for breach of contract.

The declaration contained five counts, and the principal argument of defendants is that none of these counts states a cause of action. It is too well settled to require citation of authority that if any one count of several in a declaration is good, a verdict will not be set aside because other counts may be defective. Bennett v. Chicago City Railway Co., 243 Ill. 420. A defect in pleading, in substance or form, which may be fatal upon demurrer is cured by verdict where the issue joined is such as necessarily requires proof of the facts so imperfectly stated or omitted. Chicago & Alton R. R. Co. v. Clausen, 173 Ill. 180.

Plaintiff's first count alleged that she (whose maiden name was then Cora C. Galloway) and the defendants entered into an agreement in writing dated August 2, 1924, touching the sale by defendants and the purchase by plaintiff of certain rights in the National Thrift System in the state of Illinois. The plan of operation of this System is not material; it seems to have been a device to encourage savings with the co-operation of banks.

The contract recited that the defendants, described

as parties of the first part, "are the owners of rights of National Thrift System in the State of Illinois," and that the party of the second part, the plaintiff, "desires to purchase a one-tenth interest in the rights of parties of the first part ** Now Therefore, parties of the first part agree to sell to party of the second part" a one-tenth interest in and to such rights for $1,000, and the plaintiff agreed to purchase a one-tenth interest in and to the rights and to pay $1,000 for the same. Plaintiff averred that defendants did not regard their promise to sell plaintiff a one-tenth interest in and to said rights "which they alleged were owned by them in said National Thrift System in the State of Illinois ** but thereby breached their said contract" and did not assign any interest in the rights which defendants claimed to have owned and that plaintiff therefore has received nothing from the defendants for the $1,000 paid by her to them, although she has repeatedly requested the defendants to deliver to her a one-tenth interest in the rights of the System, but defendants refused to transfer and deliver the same to her.

This is a contract to sell certain rights, and it is alleged that plaintiff performed her part of the agreement by paying defendants $1,000, but defendants refused to perform their part; this was a sufficient count to sustain a verdict.

The record shows that at the date this contract was made the only rights which defendants had in the National Thrift System were by virtue of a contract (not abstracted) entered into June 21, 1934, between "William J. McSweeney and William J. McCarthy, trading as the National Thrift System," and Daley and Usmer, the defendants here, by which the defendants were given the exclusive right to sell and develop this System in Illinois upon certain conditions. One of these conditions

was that the agreement should not be transferred or assigned without the written consent of McSweeney and McCarthy. The evidence fails to show that defendants secured this consent to the assignment or transfer of the one-tenth interest, which was the subject of the contract of August 9, 1924, between plaintiff and defendants. Furthermore, on September 18, 1924, the McSweeney-McCarthy contract was annulled. It therefore appears that defendants at the time they entered into the contract with plaintiff were never in a position to convey any of said rights except with the consent of McSweeney and McCarthy and after September 18th had no rights whatever in the System.

The second count of the declaration is good. It alleges that by their contract defendants claimed to own certain rights in the System, but that defendants were not the owners of said rights at the time of the contract and thereafter lost any and all rights which they had of any nature whatsoever in the System in the state of Illinois, thereby breaching their warranty. The rights which defendants acquired under the McSweeney-McCarthy contract were merely those of licensees for a limited term and subject to termination upon the happening of a number of contingencies - a kind of terminable permit. The defendants were not the owners of rights, as they represented themselves to be in the contract.

It might be noted that this McSweeney-McCarthy contract with Daley and Osmer was considered in an opinion rendered by another division of this court; 241 Ill. App. 525. It was there said that this contract "is unintelligible," and that Daley and Osmer borrowed the $1,000 (the subject matter of the instant suit) from Miss. Galloway. Osmer testified that he was held responsible for this money.

Error is claimed in permitting the witness McCarthy to state his opinion of the transaction. This witness did not undertake to give his opinion. He was only relating a conversation he had with the defendant Osmer, in which the merits of the transaction

were discussed. The testimony as to the annulment of the contract was largely elicited by the attorney for the defendants.

Important evidence appearing in the record is omitted from the abstract. Under such circumstances it will be presumed that the evidence, if completely abstracted, will sustain the judgment. Sloe v. Shadd, 218 Ill. 209.

The verdict is in accord with the weight of the evidence, and as there were no errors upon the trial the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

131 - 32132

247 I.A. 619[4]

JOHN KENNEDY, Appellee, vs. J. W. HENNING, Appellant.	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff's agent was driving his automobile north on Bluff avenue in LaGrange, Illinois, while defendant was driving his automobile east on Cossitt street. At the intersection of these streets the automobiles collided. Plaintiff brought suit to recover damages to his car and was awarded $800 by a jury. From the judgment for this amount defendant appeals.

Whether or not the accident was caused by the negligence of the defendant and whether the plaintiff was guiltless of any contributory negligence were questions of fact peculiarly for the jury to determine. The accident happened on Sunday, about 11 a. m. on a bright day in October, 1925. Considering the slightly variant stories of the witnesses, the jury could properly believe that plaintiff's car approached the intersection of the streets at about sixteen or twenty miles an hour, while defendant's car was approaching the intersection from plaintiff's left at a speed of about twenty-five to thirty miles an hour; that defendant's car struck the car of plaintiff on the left rear side, inflicting the damages complained of. The jury resolved the questions of fact in favor of the plaintiff, and we cannot say that its conclusion is manifestly against the weight of the evidence. Sullivan v. Chlhaver Co., 291 Ill. 359; Campbell v. C. N. L. & Pac. Ry. Co., 243 Ill. 470; Hornung v. Decatur Ry. & Light Co., 241 Ill. 1[illegible]. A large number of other cases might be cited supporting the conclusion that such questions of fact are primarily for the jury to

determine.

This was a case for the application of the statute which provides that vehicles traveling on public highways shall give the right of way to other vehicles approaching along intersecting highways from the right, and shall have the right of way over those approaching from the left. Chapter 95a, Paragraph 34, Cahill's Illinois Statutes.

A disinterested eye-witness for the defendant testified that when he first saw the plaintiff's car it was about sixty feet south of the intersection and the defendant's car about seventy-five feet west of the intersection. Plaintiff's car was approaching at twelve or fifteen miles an hour and the defendant's car at twenty-five or thirty miles an hour. It should have been evident to the defendant that there would be a collision unless he observed the rule as to the right of way and yielded this to plaintiff's car approaching from his right. This rule has been applied in many similar cases. Lenartz v. Funk, 224 Ill. App. 180; Partridge v. Eberstein, 225 Ill. App. 209; Zapf v. Kutten, 229 Ill. App. 406; McCarthy v. Fadin, 236 Ill. App. 300.

A somewhat indefinite complaint is made by the defendant as to certain instructions. They are not given in the brief, but we are referred to the abstract and record. Instructions criticized should be set out in the brief. G. F. S. Co. v. Charles F. L'Hommedieu & Sons Co., 228 Ill. App. 201. However, we have examined these instructions and find no reversible error in the action of the court with regard thereto.

Upon the evidence no other verdict could have been properly returned, so that slight irregularities upon the trial will not require a reversal. Convert v. Bishop & Babcock Co., 152 Ill. App. 316; Fridmore v. C.R.I.& P.Ry.Co., 275 Ill. 386.

The judgment is affirmed.

AFFIRMED.

Matchett, P. J., concurs.

Mr. Justice O'Connor specially concurring: I agree with the conclusion reached but not in all that is said. See Heidler v. Wilson & Bennett Co., 243 Ill. App. 89.

departure.

This was a base for the application of the doctrine which provides that vehicles travelling on public highways shall give the right of way to other vehicles approaching along intersecting highways from the right, and shall give the right of way when turns are executed from the left. Charles Fox, Insurance Co. v. Collins Elevator.

A distinctively peculiarness the international instrument that when he first saw the plaintiff's car it was about sixty feet south of the intersection and the defendant's car about twenty-five feet west of the intersection. Plaintiff's car was proceeding at twelve or fifteen miles an hour and the defendant's car at twenty-five or thirty miles an hour. It should have been evident to the defendant that there would be a collision unless he observed the rule as to the right of way and yielded this to plaintiff's car approaching from the right. Cf. Pa. Ins. Co. v. Ind. Elevator, 200 Ill. App. 1; Hunter v. Dunn, 198 Ill. App. 1; Gaffney v. Ryan, 198 Ill. App. 1; Bachrach v. Bryson, 198 Ill. App. 1; Bachrach v. Bryson, 198 Ill. App. 1.

A numerical inferiority analysis is made by the defendant as to certain instructions. They are not given in the brief, but we are referred to the abstract and record. Instructions criticized should be set out in the brief. I.C.R. 19.1. Bachrach v. Bryson, 198 Ill. App. 1. However, we have examined these instructions and find no reversible error in the action of the court upon request thereto.

Upon the evidence in this record we find that, from property damage, no fact might irrespective even the total amount paid by a insured. Hunter v. Dunn, 198 Ill. App. 1; Pa. Ins. Co. v. Ind. Elevator, 200 Ill. App. 1.

The judgment is affirmed.

AFFIRMED.

Lockwood, P. J., concurs.

Mr. Justice Lorner specially concurring: I agree with the judgment of the court but do not find it in fact. See Gaffney v. Ryan, 198 Ill. App. 1.

16 - 31673

247 I.A. 619

MORRIS R. ROSEN et al.,
Defendants in Error,

vs.

WILLIAM C. HANDLEY,
Plaintiff in Error.

ERROR TO THE MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this writ of error the defendant seeks to reverse a judgment for $770.00.

The record discloses that on September 25, 1926, plaintiffs caused judgment to be entered by confession under the terms of a written lease for $750, the same being rent for the month of September, 1926, and $20 attorney's fees. On December 3, 1926, the defendant moved that the judgment be opened up and that he be given leave to defend. The motion was in writing. The court denied the motion, an appeal was prayed to this court and allowed upon defendant filing a bond and bill of exceptions. The appeal was not perfected but a writ of error issued out of this court and on motion it was made a supersedeas.

The defendant in support of his motion to vacate the judgment filed a written document in which he set up, inter alia, that the judgment was entered under the provisions of a written lease whereby plaintiffs demised to the defendant certain premises, which lease contained a provision to the effect that the building mentioned in the lease was then in process of construction and that if it was not ready for occupancy by April 1, 1926, the rent should abate until the building should be ready for occupancy. The motion further stated that the building was not finished for occupancy April 1, 1926, "and was not finished and ready for occupancy for the month for which said judgment was rendered;" that the building was under construction during the months of April, May,

June and July, 1926, but was not ready for occupancy until after July 12, 1926, "and that no rent accrued to the plaintiffs until after said date;" that at the time of entering into the lease defendant paid to plaintiffs $750 for the first month's rent accruing under the lease and that since said date he had "paid to the plaintiffs various other sums of money, totaling at least two more months rent," and that he was ready, able and willing to pay the plaintiffs any and all sums that might be due under the lease, "but that the said sums paid as aforesaid are far in excess of any rents that have accrued to plaintiffs under said lease independent of the judgment hereinbefore entered;" that the defendant "by virtue of the terms of the said lease and by virtue of the facts set forth in the affidavits of William J. Horan, Andrew Jordan, Harland J. Davis and Elsie V. Knoblesh, hereto attached and made a part hereof," did not owe any amount to the plaintiffs on the date of the judgment. Following this is what purports to be an affidavit of the defendant. But it is neither subscribed to nor sworn to. No affidavits were attached to the motion and counsel for the defendant in their briefs say that the court refused to consider them and that he certified the bill of exceptions "with them omitted."

Counsel for the plaintiffs point out in their brief that the document filed by the defendant in support of the motion to vacate the judgment was not verified. In these circumstances we are of course unable to say that the court was in error in refusing to open up the judgment. Certainly the defendant should be required to file some sworn document before the court or produce some sworn testimony in order to have the judgment vacated or opened up. This not having been done, we are unable to say that the action of the trial court was erroneous, but on the contrary we are clearly of the opinion that it was the only action warranted.

Moreover, the document filed in support of the motion does not

Moreover, the document filed in support of the motion does not

set forth clearly that the defendant has a meritorious defense.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

78 - 31684

247 I.A. 620

FLORENCE B. ROBINSON,
Appellee,

vs.

WILLIAM A. ROGAN, CLARENCE O. ROGEN,
SVEN O. HAWKINSON and THEODORE JOHNSON,
Appellants.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendants to recover damages claimed to have been sustained by her for the malicious prosecution of a creditor's bill. The jury returned a verdict in her favor for $58,072, the court required plaintiff to enter a remittitur for $23,072, and entered judgment on the verdict for $35,000.

Plaintiff's declaration as amended was in eighteen counts; a demurrer was sustained to a number of these counts. As the case went to trial some of the counts charged the defendants with a malicious prosecution of a creditor's bill, in which action plaintiff was deprived of $22,000 of her money for about four years; other counts charged that the defendants entered into a conspiracy to extort, embezzle and wrongfully deprive her of $22,000.

The record discloses that in the fall of 1920 the defendant Rogen, who was engaged in the real estate and insurance business in Chicago, met plaintiff in the Hotel Sherman, Chicago, being introduced to her by one Charles A. Watson, Rogen having theretofore met Watson through the defendant Hawkinson, he having known Hawkinson for a number of years. At that time and for some considerable period prior to that date, plaintiff had been engaged in negotiating oil leases on property in Texas. Charles A. Watson was engaged in the same line of business and was stopping at the Hotel Sherman at that time. Watson and plaintiff had

known each other for a number of years and appeared to be very good friends; she referred to him as "Uncle Charlie" and he introduced her as his niece. Rosen became interested in oil leases and afterwards Joseph Ericson and David I. Swanson, an attorney in Chicago, and Theodore Jonnson likewise became interested in the subject, and they met Watson and plaintiff at the Hotel Sherman a number of times. Afterwards some of these parties went to Texas to look over the situation; when they returned to Chicago, and as a result of negotiations, a contract was entered into between Rosen and Watson, Rosen acting on behalf of himself and associates, whereby they were to obtain from Watson a certain oil lease in Texas, for which they agreed to pay $7,000. A cash payment of $1,000 was made. Shortly thereafter Watson was paid another $1,000, the money being given to him by Rosen but contributed by Rosen and his friends.

Afterwards it was learned that the lease Watson claimed to have had on the Texas property had not been recorded and complaint was made of this fact to him by Rosen and his associates. Watson claimed the lease had not been recorded on account of the neglect of an attorney in Texas and assured them that everything was all right. But apparently Watson was not able to straighten out the matter and Rosen demanded that the $2,000 be returned, which Watson agreed to do, but stated he had no ready money. At this time Rosen and his associates sought the advice of an attorney and the defendant Rogan was recommended by one of them as being a competent attorney to handle the matter. Rogan took the matter up and endeavored to collect the $2,000 from Watson, but without success, and at Rogan's suggestion Watson executed a $2,000 note to Rosen. On December 18, 1920, Rogan caused a judgment by confession to be entered on the note against Watson in favor of Rosen. The amount of the judgment, including attorney's fees, was $2101. An execution was issued

and delivered to the sheriff, who made a demand upon Watson, but no part of the judgment was paid; thereupon the execution was returned wholly unsatisfied, and on December 30, 1920, Rosen filed a creditor's bill against Watson and Florence B. Robinson, the plaintiff in the instant case. The creditor's bill was in the usual form and there were allegations to the effect that Florence B. Robinson had some property belonging to Watson. On the same date the court, on motion of the complainant Rosen, entered an order enjoining the defendants Watson and Robinson from transferring, assigning or secreting any property that Watson might be beneficially interested in, and as a part of the same order the court appointed Jacob Goldman receiver of all the property, effects and assets of Watson. Complainant was required to and filed a bond in the sum of $100, the receiver one for $2,000, and it was further ordered that the cause be referred to William A. Doyle, one of the masters in chancery in the Circuit court, with full authority to subpoena all witnesses for the purpose of discovering assets belonging to Watson. Later on the same day a subpoena was served on Florence B. Robinson to appear before Master Doyle. There was a hearing on that date before the master, which was continued until the next day to enable Florence B. Robinson to obtain counsel. On the next day the hearing was resumed. The defendant Robinson was represented by counsel and it developed that there were two checks in possession of the First National Bank of Chicago, belonging to the defendant Robinson, one for $2,000 and one for $20,000. These checks were left with the master, who suggested that the parties appear the next day before the chancellor for instruction as to what should be done with the checks. On January 10, 1921, an order was entered by the chancellor which recites that the motion of Robinson to dismiss the bill of complaint came on to be heard and that she withdrew from her motion that part requesting that an order be entered

directing the master to return the checks to her. Her motion to dismiss the bill was denied. On January 29, 1921, the defendant Robinson presented her motion and affidavit asking for an order requiring the master to return the checks to her.

Afterwards on February 7, 1921, certain parties from Indianapolis obtained leave to file their cross-bill, which they did on February 11th, wherein they averred that Charles W. Watson owed them $17,000 and that the defendant Robinson had property belonging to Watson. On February 14, 1921, the defendant Robinson filed her demurrer to the cross-bill and on March 11th following the demurrer came on for hearing as well as a petition filed by Goldman, the receiver, and an order was entered over-ruling the defendant Robinson's demurrer to the cross-bill. And it was further ordered that the motion of Robinson for an order requiring the master in chancery to turn over to her the two checks or, in the alternative, that the checks be returned to the First National Bank of Chicago and that the temporary injunction above mentioned be vacated, be over-ruled and denied; her demurrer to the receiver's petition was also over-ruled. It was further ordered that Master Doyle turn over to the receiver Goldman the two checks, provided the receiver submit for approval his bond in the sum of $25,000. The order then recited the submission and approval of the receiver's bond and it was further ordered and decreed that Goldman, the receiver, be authorized to collect the money on the two checks, "and to that end do and perform all acts that may be necessary to secure the proceeds of said checks or drafts by endorsement or any other way," and that he hold the funds subject to the further order of the court.

Afterwards the defendant filed her answer to the cross-bill and in May, 1921, on the application of the defendant Robinson a dedimus was issued to take the deposition of Watson and others

directing the bearer to return the money in one, the notice to finance the bill was denied. On January 20, 1911, the national bankers organized for means and actively energy for an order requiring the bearer to return the money to me.

Efforts on February 7, 1911, against Justice Dale Lockwood obtained leave to file brief cross-bill, which they did on February 11th, wherein they charged that Robert R. Watson had been 117, and that the defendant bankers had property belonging to Watson. On February 14, 1911, the defendant bankers filed her demurrer to the cross-bill and on March 1 the following the demurrer came on for hearing on motion to a written trial by Judgment, the trustee, and an order was entered overruling the defendant bankers's demurrer to the cross-bill. And it was further ordered that the motion of bankers for an order requiring the money in controversy be paid to my bro Bra Gerald on, in the alternative, that the money be returned to the First National Bank of Chicago and that the Temporary injunction above mentioned be vacated, be withdrawn and dissolved by the demurrer to the receiver's petition was sustained. It was further ordered that the money be paid over to the receiver without the law charge, provided the receiver submit for approval the bond in the sum of $2,000. The order then vacated the injunction and approved of the receiver's bond and it was further ordered and decreed that on the receiver, he authorized to collect the money on the two checks, "and to that end to put parties all such that may be necessary to secure the presence of said checks or drafts by endorsement or any other way," and then be held for legal mailed to the proper order of the court.

Effective the defendant filed her answer to the cross bill and in May, 1911, on the modification of the defendant Bankers a judgment was issued to date the dismissal of Tarson and others.

at Fort Worth, Texas. It seems that thereafter both parties took depositions touching the issues involved in the creditors' bill and in the cross-bill, but the defendant Robinson did not take the deposition of Watson nor of Mrs. Watson. A number of depositions were taken in the case. About April, 1923, the Chancellor began investigating the doings of Jacob Goldman, who had been appointed receiver in about one hundred cases which had been instituted in the Circuit court of Cook county and covering a considerable period of time, and an order was entered removing him as receiver in the creditors' bill, and the Chicago Title and Trust Co. was appointed in his stead. An order was also entered removing William A. Hogan as attorney for the receiver.

The record further discloses that on December 21, 1921, when the hearing was resumed before the master, the defendant, Robinson, was represented by Timothy J. Noll and on the next day he was succeeded by attorney George L. Schein and his associate Leo H. Hoffman; these attorneys were later succeeded by attorneys Albert Fink and Francis X. Lewis; later John H. Scanlin was substituted and he in turn was substituted by Messrs. Wright, Atcock, Naight & Harris, and Vail & Vail, who were later succeeded by attorneys P. J. Lucey and Gerald R. Barry. On December 3, 1923, the latter attorneys were succeeded by Edward G. Woods, defendant's present counsel, and on his motion the court entered an order requiring the complainant to file an additional bond in the sum of $7,400.

On February 13, 1924, the defendant filed her petition praying that an order be entered requiring the receiver to turn over to her $2450. An order was entered directing the receiver to pay the defendant, Robinson, $2,000. Afterwards the defendant was given leave to withdraw her answer to the cross-bill and reinstate her demurrer. Her demurrer was then sustained to the cross-bill and it was dismissed as to her and orders were subsequently entered

at Mors Verde Farm. It would not interfere with petition talk. Consultations inquiring, the issues involved in the constituent bill and in the cross-bill, for the defendants mentioned in the case the Commission of Taken not of are. Thirsty. A member of constituents were taken in the case. About quick, 1855, the commissioner began investigating the things on Jones Gardens, who had been mentioned twice in about one instrument cause which had been described in the Church Herald at Rock Creek. The petition a constituents signing 42 Hour, and an order was entered requiring him to transfer to the Auditors' bill, and the things Jones had taken on, was mentioned in his stand. An order was also entered requiring Elijah G. Hogan, an attorney for the receiver.

The Independent Journal discovered that on January 14, 1855, upon the petition of the Trustees Delta in the county, the petitioner, Sophronia, was represented by Timothy J. Pell and on his hour cry he was represented by Attorney George A. Hallowes. Thomas and the Commissioner and A. Hallowes stand attorney were issued recognized by attorneys Edward Fine and Francis T. Lawrence Lynn Jones. Timothy was established and in the case was substituted by Samuel Jones, Sidney Hagge & Barrie, and Paul E Pell, who were later represented by attorneys T. F. Lacey and Gerald T. Barry. On December 7, 1855, the latter attorneys were succeeded in defend A. Tuesday, Defendant's present counsel, and by the action the court ordered an order requiring the receiver to file an additional bond in the sum of $7,000.

On February 12, 1856, the Commissioner filed his report stating that no error be entered requiring the property in Jones over to the Auditor. An order was entered directing the receiver to pay the Commissioner, $7,000. Although the defendant was given leave to withdraw his answer to the cross-bill and petition for demurrer. The demurrer was then sustained in the cross-bill and it was dismissed on 14 Jan and orders were subsequently entered

which required that the balance of the $33,300 be paid to her, and this was done.

Watson was defaulted and it appears that sometime thereafter he entered his special appearance and filed a petition for the removal of the cause to the Federal court. The removal was denied and the cause reinstated in the state court. The matter came on for hearing before the chancellor and after a trial that lasted six days the creditors' bill was dismissed as to the defendant, Robinson, the court having found the merits in her favor. Subsequently the instant case was brought.

The record in the instant case is voluminous, consisting of 3345 pages. The evidence took a wide range and a great deal of it was immaterial and irrelevent to the issues involved. Counsel for the defendant have filed an original brief of 173 pages and a reply brief of 75 pages, while counsel for the plaintiff have filed a brief of 445 pages. Counsel for the parties have paid little or no attention to Rule 19 of this court. Instead of making a concise statement of the case as the rule requires, plaintiffs have taken up 45 pages in this way, While counsel for the defendant have filed what they designate a statement which covers 132 pages. This alleged statement quotes evidence in considerable detail, interspersed with argument and foot-notes, so that we have been required to do an unnecessary amount of work, all of which would have been obviated had the rule been considered.

In brief compass the evidence tends to show that Florence E. Robinson, the plaintiff, and Charles A. Watson were friends for a number of years; that they were both engaged in negotiating oil leases on Texas property; that in the fall of 1920 they were both stopping at the Hotel Sherman in Chicago and each was engaged in negotiating an oil lease; that the defendant Rosen was introduced by defendant Hawkinson to Watson and later met Watson and plaintiff in the lobby and corridor of the hotel; that there were a

number of meetings covering a period of a few weeks, and Watson endeavored to interest Rosen and his friends in oil leases; that after Rosen had given the $2,000 as heretofore mentioned, and was endeavoring to have it returned, Watson stated that plaintiff, Robinson, had $85,000 of his money and for that reason he was unable to return the $2,000. The defendants' evidence was to the effect that they instituted and prosecuted the creditors' bill for the purpose of securing the $2,000 that they had given Watson, and that the cross-bill was filed for the purpose of securing the $17,000 that Indianapolis parties had given Watson. There is no dispute in the record, nor is there any argument made that Watson did not owe the $2,000 to Rosen and his associates and the $17,000 to the Indianapolis parties. But plaintiff's position, as we understand it, was and is that she did not have any money or property belonging to Watson; that the defendants knew this but fraudulently and maliciously prosecuted the creditors' bill and cross-bill; that the proceeding before Master Doyle was not in good faith; that the defendant Rosen and others learned when she met them in the Hotel Sherman with Watson that she had the two checks for $22,000 and without any justification endeavored to take it from her. She offered in evidence depositions which she had taken in Texas tending to show that the $22,000 belonged to her; that she had no property belonging to Watson. But when the defendants offered the substance of the deposition taken by them tending to show the contrary, on objection of counsel for plaintiff it was excluded. This was apparently on the theory, as stated by the court on the trial, "because that has been adjudicated by this court that the woman owned the money." In other words, the court was of the opinion that because it had been adjudicated in the chancery proceeding that the $22,000 belonged to plaintiff, no evidence could be offered in the instant case, tending to show the contrary. In this the court was in

error, because it is the law that although the chancery suit resulted in a decree in favor of the plaintiff in the instant case, yet she could not maintain this action for the malicious prosecution of that case unless she showed that there was want of probable cause on the part of the complainant in the chancery case. Glenn v. Lawrence, 280 Ill. 581. The defendant also offered evidence tending to show that there was probable cause for the prosecution of the chancery case, but the court rejected most of this evidence when it appeared that the facts sought to be adduced came to the complainant's knowledge after the beginning of the chancery suit. Sustaining objection to this evidence was error. The chancery suit was begun in December, 1930, and it was pending against Florence B. Robinson until some time in the year 1934, a period of more than three years. The instant case was brought to recover damages not only for the institution of the chancery case but for the prosecution of it. If she had received back her $20,000 shortly after the beginning of the suit, her damages would have been small, but the chief damages she claimed was in being kept out of possession of the $20,000 for about three and one-half years. It is obvious that if complainant after the beginning of the chancery suit had received information which would warrant the continued prosecution of that case, this would be competent evidence in the instant case as tending to show that complainant had probable cause for prosecuting the chancery case and thereby defeat the action.

Upon a careful consideration of all the evidence in the record we are clearly of the opinion that there is no merit in the plaintiff's case. The verdict in her favor is against the overwhelming weight of the evidence. The evidence all tends to show that in the prosecution of the chancery case the complainant was endeavoring to get his money, of which he had been defrauded by Watson, that this was the sole purpose, and the evidence to

the contrary is but little more than a scintilla. The jury, we think, did not comprehend the issue, because the question involved in a suit for malicious prosecution is difficult for the jury to understand. On this subject our Supreme Court in the case of Collins v. Hayte, 50 Ill. 353, said (p. 354):

> "Our experience teaches us there are few questions of law more difficult of comprehension by a jury than those which govern trials for malicious prosecutions. It seems difficult for them to appreciate, if the plaintiff was really innocent of the charge for which he was prosecuted, that he still ought not to recover. They do not readily comprehend why any innocent man may be prosecuted for a supposed crime or offence, and yet have no recourse against the prosecutor who caused his arrest and imprisonment, and yet the preservation of the peace and the good order of society require that even innocent men may be compelled to submit to great inconvenience and hardship, rather than citizens should be deterred from instituting prosecutions where there is reasonable or probable grounds to believe in the existence of guilt. Good faith on the part of the prosecution is always an important, if not a vital, element of inquiry, and is always a sufficient justification, except where an unreasonable credulity is manifested, inducing the prosecutor to draw conclusions of guilt, when it would have been wanting in the perception of a person of ordinary prudence and judgment."

The brief and argument filed by counsel for plaintiff well deserves the condemnation of a similar brief as expressed by the Supreme Court of the United States in the case of Royal Arcanum v. Green, 237 U. S. 531. We will not refer to what is said in the brief in this regard, but it is sufficient for us to say that there is no basis in the record for any criticism of the Master in Chancery. The adverse criticism of the Master and of the hearings had before him are wholly unwarranted.

Counsel for the defendants argue that the judgment be reversed with a finding of fact, but we are not authorized under the law to do this. Wirich v. Forschner Contracting Co., 312 Ill. 343.

For the reason that the verdict is against the overwhelming weight of the evidence, the judgment of the Superior court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and McCurely, J., concur.

84 - 31990

247 I.A. 620

PEOPLE OF THE STATE OF ILLINOIS
ex rel. ELEANOR M. STALLBOHM,
Appellant,

vs.

THE BOARD OF EDUCATION OF THE
CITY OF CHICAGO and WILLIAM McANDREW,
Superintendent of Schools of Chicago,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

The People of the State of Illinois on relation of Eleanor M. Stallbohm, filed a petition against the Board of Education of the City of Chicago and William McAndrew, Superintendent of the Schools of Chicago, praying that a writ of mandamus issue directed to the defendants, commanding them to issue to the relatrix "a certificate appointing her a permanent elementary school teacher in the public schools of the City of Chicago;" to grant and furnish her a permanent position as such elementary school teacher with a minimum yearly salary of $1750; to certify her name on the payrolls of the Board of Education as such permanent elementary school teacher; and that she be paid the amount she would have earned as such teacher since September 1, 1923, less what she has theretofore received. A demurrer was sustained to the petition, it was dismissed and this appeal followed. So the question presented is, does the petition state a cause of action.

The allegations of the petition are that the relatrix is and has been for more than ten years last past a resident of Chicago; that the Board of Education is a corporation and that William McAndrew is the Superintendent of Schools of Chicago; that under the statute the Board of Education is given certain powers and has certain duties to perform. Then follows the powers and duties specified in Sections 138 and 161 of the school act applicable

to Chicago. The petition further sets up that in the summer of 1920 relatrix appeared before the Board of Examiners as an applicant for the position as a teacher in the elementary schools of Chicago; that on September 1, 192[illegible], the Board of Education issued to her a certificate authorizing her to teach in the elementary schools for a period of approximately one year, at the expiration of which time the certificate was renewed yearly for a period of five years; that she held such certificates for the years 1920-21-23-24-25-26, and during these years she was employed by the Board of Education and rendered services as an elementary school teacher, during a part of which time she was paid $6.00 a day, which was later increased to $7.00 a day for the days she actually worked; that during all the time she was employed as an elementary school teacher she conducted herself properly and discharged her duties in an efficient and satisfactory manner; that in September, 1923, "having previously and satisfactorily served a probationary period of three years" as an elementary teacher in the public schools, she became and was lawfully entitled to a permanent appointment as such teacher, and it became the duty of the Board of Education to issue to her a certificate appointing her as an elementary school teacher in the city schools, subject to removal for cause only, and to carry her on the payrolls at the salary allowed a permanent elementary school teacher; that she on numerous occasions demanded of the Board of Education that they issue to her a certificate "as permanent elementary school teacher," but that the board refused to do so, although she was ready and willing at all times to perform her duties as such teacher; that during part of the period of her employment she was paid $7.00 a day for the days she actually worked; that during the year ending June, 1930, the number of days she was allowed to work kept decreasing and by reason thereof her earnings were decreased and that she is informed

by the Board of Education that the yearly temporary certificates will not be renewed and that her services will be required no longer; that there has been in force and effect for a longer period of time a rule of the Board of Education which provides that a regular elementary school teacher after receiving permanent appointment shall be paid a yearly salary of $1750 a year, "with other provisions for increases in salary for length of service and merit;" that there are approximately 5,000 regular elementary school teachers employed by the Board of Education who have permanent appointments and who receive the minimum salary of $1750 or more; that a great number of such teachers received their appointments after the relatrix had completed her three years of probation, and that the relatrix was entitled to one of these positions after September, 1923. These certificates issued to her are made a part of the petition and each of them is entitled "Teachers' Temporary Certificate - Day Schools, Substitute - Elementary."

The relatrix contends that she is entitled to the relief prayed for by virtue of the provisions of Sections 137, 138 and 161 of the School Act applicable to Chicago. Section 137 provides that the Board of Education, subject to certain limitations contained in the Act, shall have power to prescribe the courses and methods of study in the public schools and to employ teachers and to fix their compensation. By Section 138, a board of three examiners is constituted, "whose duty it shall be to examine all applicants who are required to hold certificates to teach," and the Board of Education shall issue gratuitously to those who pass a required test of character, scholarship and general fitness, such certificates to teach as they are found entitled to receive; that the board of examiners shall hold examinations as required by the Board of Education upon recommendation of the Superintendent of Schools, and "shall prepare all necessary eligible lists which shall be kept in the office of the Superintendent of Schools and be open to public inspection.***

by the Board of Education that the yearly temporary certificates will not be renewed and that her services will be required no longer; that there has been in force and effect for a longer period of time a rule of the Board of Education which provides that a regular elementary school teacher after receiving permanent appointment shall be paid a yearly salary of $1700 a year, "with proper graduations for increases in salary for length of service and merit;" that there are approximately [illegible] regular elementary school teachers employed by the Board of Education who have permanent appointments and who receive the minimum salary of $1700 or more; that a great number of such teachers received their appointments after the relatrix had completed her three years of probation, and that the relatrix was entitled to one of such positions after September, 1933. These certificates issued to her are each a part of the petition and each of them is entitled "Teachers' Temporary Certificate - Day Schools, Substitute - Elementary."

The relatrix contends that she is entitled to the relief prayed for by virtue of the provisions of Sections 127, 128 and 131 of the School Act applicable to Chicago. Section 127 provides that the Board of Education, subject to certain limitations contained in the act, shall have power to prescribe the courses and methods of study in the public schools and to employ teachers and to fix their compensation. By Section 128, a Board of three examiners is constituted, "whose duty it shall be to examine all applicants who are required to hold certificates to teach," and the Board of Education shall issue gratuitously to those who pass a required test of character, scholarship and general fitness, teachers certificates to teach as they are found qualified in respect; that the Board of examiners shall hold examinations as required by the Board of Education upon recommendation of the Superintendent of Schools, and "shall prepare all necessary eligible lists which shall be kept in the office of the Superintendent of Schools and be open to public inspection,"

Appointments and promotions of teachers "shall be made for merit only and after satisfactory service for a probationary period of three years," during which period the board may discharge, under certain conditions, such teachers. That section furtherprovides that appointments of teachers as principals shall become permanent subject to the rules concerning conduct and efficiency and subject to removal for cause in the manner provided by section 161 of the Act. Sec. 161 provides for a method to be pursued in the removal of teachers who are charged with being unsatisfactory.

It will be noted that the relatrix prays that the defendants be required to pay her fromSeptember, 1923, a minimum salary of $1750 a year. If there were otherwise merit in her petition, the writ of mandamus would not be issued commanding the Board to see that she was paid since September, 1923, because any such claim that the relatrix might have in any view of the case may be barred by laches.

But there is no merit in the relatrix's petition. She nowhere alleges that she had taken the examination required by section 138 and that she has satisfactorily passed such examination. Moreover, the certificates issued to her and which she makes a part of her petition, show on their face that she was employed during the entire time as a substitute teacher, and the certificates issued to her are designated temporary certificates. We do not understand that section 138 requires permanent appointments of substitute teachers who may teach but a few days during the year, and the allegations of the petition show that the relatrix did not work throughout the several years, because it is averred that she was paid at the rate of so much per day for the days she actually worked and that during the last year the number of days she was permitted to work greatly decreased. Moreover, the relatrix prays that the writ issue commanding the defendants to issue to her "a certificate

appointing her a permanent elementary school teacher." We know of no provision of the statute authorizing an issuance of such a certificate of appointment. No such statute is pointed out, and the rules of the Board of Education which by section 131 authorizes the Board to make rules which have the force of ordinances, are not before us. The relatrix having failed to aver facts which show that she has passed the necessary examination and is entitled to a certificate, and having failed to allege sufficient facts to show that she was a teacher in the public schools of Chicago for a period of three years, but on the contrary showing that she was but a substitute teacher, the demurrer was properly sustained and the petition dismissed.

The judgment of the Circuit court of Cook county is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

93 - 32033

247 I.A. 620[3]

CHARLES C. GIDDINGS and MARY E. GIDDINGS, Appellees, vs. DONALD S. WILLIAMS and MRS. DONALD S. WILLIAMS, Appellants.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

On April 4, 1927, plaintiffs, the landlord, obtained a judgment by confession against the defendants, tenants, for $257.50, the same being $225 as rent for the month of April, 1927, and $32.50 for attorneys' fees. Afterwards the judgment was opened up and the defendants given leave to defend. The case was then heard before the court without a jury and there was a finding and judgment for plaintiffs and the defendants appeal. When the judgment was opened up and the defendants given leave to defend, the affidavit which they filed in support of their motion was ordered to stand as their affidavit of merits.

The record discloses that on October 13, 1925, plaintiffs and defendants entered into a written lease whereby "a front room and a rear room on the first floor of a brick building located at No. 669 North Michigan avenue, Chicago, Illinois," were demised to the defendants to be occupied by them as a salesroom for the sale of linen merchandise. The lease covered a period commencing November 1, 1925, and expiring September 30, 1930, at a total rent of $15,075, payable in monthly installments. The evidence shows that the defendants entered into possession of the premises and conducted their business until March 5, 1927, when they vacated the premises; that they paid all rent up to April 1, 1927, and as stated, the instant case is brought to recover the rent for April, 1927.

The defendants in their affidavit of merits set up

among other things that after taking possession of the premises they were continually being hampered in transacting their business by the interference of the plaintiffs; that the plaintiffs entered the salesroom and workroom of defendants and interfered with defendants' employees, and that plaintiffs were continually quarreling among themselves and their employees, causing disturbance in the building, thereby keeping defendants' customers from transacting business with them; that one of plaintiffs "was continually talking about burglars and wondering why the defendants did not lose any of their stock;" that plaintiffs failed to supply the necessary heat during the winter period, so that defendants' employees were compelled to fire the furnace at various times; that on account of the failure to furnish heat the defendants suffered great loss in that their employees could not work, and that on several occasions the Department of Water shut off the water from the building because of the failure of plaintiffs to pay the water taxes; that the Commonwealth Edison Company shut off the lights, owing to the failure of plaintiffs to pay their electric light bill to that Company; that other tenants of the building made complaint to the Health Department against plaintiffs on account of their failure to furnish heat; that court bailiffs, seeking to serve writs on plaintiffs, were continually around the premises, creating bad impressions on defendants' customers; that plaintiffs in quarreling between themselves and their employees, used vile language, which "disgusted" the customers of the defendants, and that defendants thereby lost a considerable amount of business; that one of plaintiffs told one of the defendants on numerous occasions that plaintiffs expected to lose their lease because plaintiffs were unable to pay rent; that defendants were unable to obtain burglar insurance because they occupied part of the premises with plaintiffs; that plaintiffs took the carpet up in the hallway in the entrance to the premises occupied by the

defendants and shellaced the floor; that this was done before the Christmas holidays; that plaintiffs knew that was the busy season of the year, and that by so doing they greatly decreased defendants' business; that defendants were notified by an agent of the owner of the premises that if defendants desired to stay in the premises it will be necessary for them to lease the whole building, since the plaintiffs were continuously in arrears in the payment of rent. And on account of the foregoing defendants were compelled to vacate the premises; that after defendants had vacated the premises plaintiffs made no attempt to relet the premises, but that plaintiffs themselves took possession of the premises and were occupying them for their own business.

On the trial of the case the defendants offered evidence in support of some of the matters set up in their affidavit of merits, which need not be adverted to here, as in this court the only point made is that the defendants were justified in vacating the premises because the plaintiffs failed to furnish heat as they were required to do by the terms of the lease. On the trial the court took the position that although there might have been grounds for sustaining the defendants' contention that they had been constructively evicted by the landlord on account of lack of heat, yet this could not be availed of by the defendants because they failed to vacate the premises when they might have done so, and that having paid the rent for the month of March, they could not vacate the premises and claim an eviction. In this we think there was error. We had occasion to consider this question recently in Kimm v. Hyde, 246 Ill. App. 26, where we held that a tenant might abandon the premises where the landlord fails to furnish heat as required by the lease, but that to relieve himself from the payment of rent, he must vacate the premises; that there could be no constructive eviction without surrender of the premises. We also there held that in such case the tenant was not obliged to vacate at once, but was

defendants and challenge the theory that this was done before the Christmas holidays; that plaintiffs knew that was the busy season of the year, and that by so doing they greatly interrupted defendants' business; that defendants were notified by an agent of the owner of the premises that if defendants desired to stay in the premises it will be necessary for them to lease the whole building, since the plaintiffs were continually in arrears in the payment of rent. And in pursuance of the foregoing defendants were compelled to vacate the premises; that after defendants had vacated the premises plaintiffs made no attempt to relet the premises, but that plaintiffs themselves took possession of the premises and were occupying them for their own business.

On the trial of the cause the defendants offered evidence in support of each of the matters set up in their affidavit of merits, which need not be adverted to here, as in this court the only point made is that the defendants were justified in vacating the premises because the plaintiffs failed to furnish heat as they were required to do by the terms of the lease. On the trial the court took the position that although there might have been grounds for holding the defendants' occupation had been constructively evicted by the landlord on account of lack of heat, yet this could not be availed of by the defendants because they failed to vacate the premises when they might have done so, and that having paid the rent for the month of March, they could not vacate the premises and claim an eviction. We think the court was in error. We had occasion to consider this question recently in King v. [illegible], 216 Ill. App. 84, where we said that a tenant might continue in the premises where the landlord fails to furnish heat as required by the lease, but then to relieve himself from the payment of rent, he must vacate the premises; that there could be no constructive eviction without surrender of the premises. We also there held that in such case the tenant was not obliged to vacate at once, but was

entitled to a reasonable time and that what was a reasonable time was generally a question of fact; that where there was a ground warranting the tenants in vacating the premises, this could be waived by the tenants remaining in possession, but that the tenants did not thereby waive subsequent breaches. And authorities are there cited sustaining our views.

In the instant case the defendants by remaining in the premises during the months of November, December, January and February, might be held to have waived their right to vacate the premises in case the facts warranted the court in finding that the landlord failed to furnish necessary heat during those months. But if the evidence showed that in the month of February it was so cold as to warrant the tenants in vacating and they told the landlord that they were going to do so on account of lack of heat, and the evidence further showed that they made reasonable efforts to secure new quarters and vacated the premises as soon as new quarters were obtained, we think a constructive eviction would be shown. And while, as stated, we think the court erroneously limited the defendants in the introduction of their evidence, yet we would not be warranted in reversing the judgment, because nowhere in the record did the defendants make an offer as to what they expected to prove. Unless the evidence offered was of such a character that the trial court might under the law find that the defendants would be warranted in vacating the premises, we would not be warranted in reversing the judgment. There being a failure in this respect, the judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

entitled to a reasonable view of the facts, such that a reasonable jury was generally a question of fact; that where there was a ground warranting the jury's or standard for criminal, this might be noted by the lawyer reluctant to prosecution, but just the case did not thereby raise substantial questions. And motivation are their plea advocating the theory.

In the instant case the activity by resulting in the primary finding the matter of jurisdiction, Thereby, Tarrant and Delivery, might be held to also defined that it not to raise the problem in case the State's representation was made in finding that the Tarrant Fully to Tarrant adequately like having done nothing. But if the citizens argued that in the court of Delivery it was so said as to arrange the Bonds in waiting and they with the know-how that they were going to do so without or less or more, and the citizens certain number that they made commercial efforts to secure the question the trial the problems in such as was questions such element, in view a commercial activity shall be shown. And which, as stated, is that the court commercially limited the relationship in the instrument of state activity, yet he would not be essential to commence the primary, Tarrant was where in the local and the citizens made an offer to the what they appeared to prove. Unless the evidence offered was of such a character that the trial court might order the instrument that the authority could in assuming the business, as which may be existing in Tarrant the document. There also a finding in this remark, the Judgment of the Bondholders courts of charge in affirmed.

AFFIRMED.

Montgomery, C. J., and Dunnigan, J., concur.

148 - 32069

247 I.A. 620[4]

RALPH B. WAITE, Doing Business as RALPH B. WAITE PIANO CO., Appellant, vs. FRANCIS A. WILLIAMS, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of replevin against the defendant, seeking to recover the possession of a piano. The piano was taken on the writ and delivered by the bailiff to the plaintiff. Afterwards the cause came on for hearing before the court without a jury and at the close of the plaintiff's case the court found that the right to the possession of the piano was in the defendant, a writ of retorno habendo was awarded and plaintiff appeals.

The evidence tends to show that plaintiff was engaged in the buying and selling of pianos; that he bought the piano in question and on January 15, 1926, defendant's wife signed a written document to buy the piano in question for $1035. Certain payments were made at the time and the contract provided for further payments of $50 on the first of each month thereafter until the purchase price was paid in full. It further provided that the piano should remain the property of the plaintiff until paid for in full. Apparently upon the execution of this contract the piano was delivered. A day or two afterwards, the defendant, Francis A. Williams, husband of Mrs. Williams, called at plaintiff's place of business and stated he did not want his wife to sign the contract but wanted to sign it himself. Upon the contract being produced, he struck out his wife's name and signed his own name. The evidence tends to show that the defendant made a number of monthly payments, the last one being

on August 30, 1926. There is further evidence tending to show that before bringing the suit plaintiff demanded the return of the piano and not having obtained it brought this action and recovered the piano on the replevin writ.

The defendant contends that the judgment is right and should be affirmed because the evidence shows that the defendant's wife purchased the piano on the installment plan, signed the contract, and the piano was delivered to her; that the court properly refused to admit the contract in evidence because it showed on its face that it had been altered. We think neither of these contentions can be sustained. The evidence shows that the plaintiff sold the piano on the installment contract, the title to remain in plaintiff until it was paid in full; that the piano was delivered and whether to the defendant or his wife, it is obvious that they were living together. and the undisputed evidence is that the defendant made several payments on the contract after the piano was delivered. Further, the piano was taken from the defendant by the bailiff by virtue of the replevin writ. There is no merit in the contention that the contract was properly excluded, because it appeared altered on its face. The alteration was explained by plaintiff's testimony and it is uncontradicted. The contract should have been admitted. Nor is there any merit in the contention that the evidence fails to disclose that a demand was made for the piano before bringing the suit. The evidence in the record is unsatisfactory. Counsel for plaintiff did not bring out the facts as should have been done, but it is obvious that the piano would not have been returned had a demand been made, and since it would have been unavailing no demand is necessary. National Band and Investment Co. v. Bakes, 230 Ill. App. 608; Lee & Chapell Co. v. Pennsylvania Co., 291 Ill.

248; Deans v. Fort Dearborn Trust & Savings Bank, 241 Ill. App. 517.

The judgment of the Municipal Court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur.

127 - 32098

247 I.A. 620[5]

J. WALLACE WAKEM, Appellee,	)	
	)	APPEAL FROM MUNICIPAL COURT
vs.	)	OF CHICAGO.
AARON BODENWEISER, Appellant.	)	

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

On May 4, 1927, a judgment by confession was entered in the Municipal court of Chicago in favor of the plaintiff and against the defendant. The basis of the judgment was a promissory note dated August 7, 1923, for $1250, due sixty days after date to the order of the plaintiff and made by the defendant. On May 13, 1927, on motion of the defendant, the judgment was opened up and he was given leave to defend and the affidavit which he filed in support of his motion was ordered to stand as his affidavit of merits.

The defense was that the defendant on April 29, 1924, filed a voluntary petition in bankruptcy in the United States District Court for the Northern District of Illinois; that he scheduled the note in question and that in the regular course defendant was discharged in the bankruptcy proceeding by an order entered by that court on October 6, 1924. There was a trial before the court without a jury and there was a finding and judgment in plaintiff's favor and the defendant appeals.

In support of his defense the defendant introduced in evidence a part of the schedule filed by him in the bankruptcy court; that schedule shows that Wakem & McLaughlin of No. 225 E. Illinois street, Chicago, Illinois, was one of the defendant's creditors; that the indebtedness was contracted in "1923 at Chicago, Illinois," the amount being $1525.00. The evidence shows that Wakem & McLaughlin, the creditor mentioned in the schedule,

was an Illinois corporation, located at No. 225 East Illinois street, Chicago, and that the plaintiff, J. Wallace Wakem, was the president, director and stockholder and the general manager of Wakem & McLaughlin. The testimony offered on behalf of the plaintiff was that he had no notice or knowledge of the bankruptcy proceeding of the defendant until after the order of discharge had been entered in the bankruptcy court. There was further evidence to the effect that the plaintiff and the Wakem & McLaughlin corporation received their mail at the same address, No. 225 East Illinois street. There was further evidence touching the question as to whether plaintiff knew of the pendency of the bankruptcy proceeding. The court found in favor of the defendant, that plaintiff's debt had not been scheduled and that he had no notice or knowledge of the bankruptcy matter until after the order was entered by that court. We have carefully considered all the evidence in the record and are unable to see that the finding of the trial Judge was against the manifest weight of the evidence. In these circumstances, we are not warranted in disturbing the judgment.

Plaintiff's claim was of that character that it would be discharged in bankruptcy if it had been scheduled whether plaintiff actually received notice of the bankruptcy proceeding or not. It would also be discharged even if the claim were not scheduled if plaintiff received notice of the pendency of the bankruptcy. Par. 3, Sec. 17, Bankruptcy Act; Allen v. Straka, 118 Ill. App. 184; Thomson v. Carroll, 148 Ill. App. 493; Matteson v. Dever, 141 Ill. App. 523. Accuracy, however, in the scheduling of a claim by a bankrupt is not essential. Matteson v. Dever, supra. In the instant case plaintiff's claim was not scheduled at all. The claim scheduled was sworn to by the defendant to be due from him to Wakem & McLaughlin, a corporation, and the amount was stated to be $1575.00. We think this is nota scheduling of plaintiff's claim so as to bring it within the Bankruptcy act.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Matchett, P.J., and McSurely, J., concur.

11 - 31214

W. F. WOODRUFF,
Defendant in Error,

v.

RAYMOND A. VON DANDEN,
Plaintiff in Error.

ERROR TO CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This writ of error seeks review of a judgment by confession.

The record consists of a narr. and cognovit in the usual form, the judgment order, an order denying defendant's motion to vacate the judgment and allowing an appeal therefrom, and a bill of exceptions setting forth the notice, motion and affidavit considered by the court on entry of the latter order.

The appeal came before this court and a decision was rendered therein July 13, 1927, affirming the order denying the motion to vacate.

Plaintiff in error has assigned ten errors, four of which rest upon said bill of exceptions and were considered and decided adversely to defendant on said appeal. Manifestly they cannot be readjudicated. The other six assignments of error were not only released by the cognovit, and therefore plaintiff in error cannot be permitted to assign them (Boyles v. Chytraus, 178 Ill. 370, 374), but there is nothing in the record on which to predicate them. It contains no bill of exceptions of proceedings had at the time of the entry of judgment, which, in its absence, were presumably sufficient to authorize the judgment. As the judgment was entered in term time,

the warrant of attorney, the affidavit of execution and leases upon which judgment was confessed, must, in order to be considered, be brought up by a bill of exceptions, and that was not done. (Id. 374.) While the common law record purports to show that the leases containing the power of attorney were attached to the narr., they formed no part thereof, and not being preserved in a bill of exceptions are not open to our consideration. (Id.)

There is, therefore, no basis in this record for any of the assignments of error that have not already been adjudicated by this court on said appeal, nor for questioning the jurisdiction of the court. The judgment will be affirmed.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

247 I.A. 621

160 - 31771

BRENNAN PACKING COMPANY, Appellant,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
E. G. SHINNER & COMPANY, Appellee.	

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a fourth class case of the Municipal court of Chicago.

Plaintiff is engaged in the business of pork packing and sells and distributes its product to wholesalers and retailers. Defendant operates retail meat markets in the City of Chicago. Plaintiff made sales of its product to defendant for about ten years prior to 1924, making deliveries thereof at defendant's retail stores in barrels, which, when empty, its drivers on other trips were accustomed to pick up.

The statement of claim is for an alleged indebtedness arising upon an implied contract from an alleged custom and usage for the vendee to return the empty barrels within a reasonable time or pay therefor at the rate of fifty cents each for those unreturned.

Defendant's affidavit of merits denies the indebtedness, the delivery of the number of barrels, "as set forth in plaintiff's statement of claim," and the existence of such a custom in the trade.

In answer to a special interrogatory the jury found there was such a custom, but rendered a verdict in favor of defendant. From a judgment on the general verdict plaintiff appeals, arguing (1) that defendant should have been limited

to the defenses set up in its affidavit of merits, and (2) that the court should have directed a verdict for appellant on the special finding. As to the first point it is urged as error that the court received evidence tending to show an express contract and gave an instruction predicated thereon, and that such a defense was not stated in defendant's affidavit of merits.

Regardless of whether or not defendant should be permitted to show as against plaintiff's claim of an implied contract that there was an express one it appears that the evidence received, which tended to show an express contract rather than an implied one, was first introduced by plaintiff and received over defendant's objection, and that other testimony of like character, complained of, was not objected to by plaintiff. Plaintiff, not having objected to such evidence or moved to strike the same, has not properly saved its point and, of course, cannot urge it here for the first time.

As to appellant's second point, there being evidence of the character now complained of but not objected to, from which the jury might find that while there was such a custom there was, nevertheless, an express agreement between the parties with respect to plaintiff's right to get and take back empty barrels but without responsibility of defendant for their return, it cannot be said that the general verdict was necessarily inconsistent or irreconcilable with such special finding.

The recovery sought is for barrels not returned from December, 1922, to July, 1924, inclusive. Plaintiff's president and manager, who conducted the negotiations with defendant, testified that the trouble between them started when the barrel account began "to run a little high," and that in a conversation with defendant's buyer between 1923 and 1924, he said: "I won't

sell you this stuff unless it is understood any goods sold to you for delivery in the City of Chicago, that the barrels either have to be paid for or returned;" and that he would not accept his order unless he agreed to that, and that the buyer replied, "I will see that you get your barrels back * * here take the order." It also appears that after plaintiff's president testified that he had control of the sale of meat to defendant during the years 1922, 1923 and 1924, he was asked "was there any particular agreement with reference to barrels," and he answered that it was not only understood "but specifically stated whenever any transactions were made."

Defendant's president testified that when plaintiff's president called him up and claimed that defendant did not give back enough barrels he replied, "I understand your drivers do not pick up the barrels * * you can have them if you wish, but understand, I am not assuming responsibility for your barrels."

From such evidence, unobjected to by plaintiff, we cannot say that the general verdict was inconsistent with the special finding. The insufficiency of the evidence, while assigned as error, is not argued. The points argued are not well taken.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

179 - 31790

MCKENDRY REALTY COMPANY, Appellee,	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
v.	
OSCAR A. JOHNSON et al., Appellants.	

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a suit to recover a real estate commission on the theory that plaintiff through its agent, one Welter, was the procuring cause of the sale of defendants' real estate to one Mandis. From a verdict and judgment for plaintiff defendants have appealed.

Welter claims that on November 8, 1925, he took Mandis and his wife out to show them property and on the trip stopped at Johnson's house and leaving Mandis' wife in the car went to the door and told him he had a customer for the property; that Johnson gave him, at his request, the price of $33,000; that he then said to Johnson, "you understand you will have to pay a commission." He never talked with Johnson either before or after that time except, as he claimed, to make him an offer two or three days later of $28,000 over the telephone. It does not appear that he at any time disclosed who he was or whom he represented. There was no proof that Johnson assented to the payment of a commission directly or impliedly. Welter testified that a few days later he took Mandis to the premises in question again and Mandis then made an offer of $25,000, which he communicated to Johnson as aforesaid, without disclosing who

made the offer, and that Johnson said he would not consider it. Welter had no further conversation with either Mandis or Johnson until after Mandis closed a deal for the property with Johnson about February 23, for $30,200, and made no further effort to effect a sale to Mandis.

Johnson denied ever having seen Welter prior to the hearing of the case or ever having had any conversation with him at all. Mandis testified he was not in Chicago in the month of November, 1926, when Welter claimed to have taken him to the premises in question, but that it was about two weeks before Christmas, 1926, when Welter took him out and showed him several pieces of property, including Johnson's; that when they came to the Johnson property he told Welter he had been to that property before, and did not care to stop, but Welter insisted on stopping there; that they did not stop at Johnson's house; that he had previously visited the property some six or seven times and had talked with Johnson about the property in October, and never made an offer of $25,000 for the property. He was erroneously, we think, not permitted to state the conversation he had previously had with Johnson about the property, if it was with reference to purchasing it. That he had visited the property before he met Welter was confirmed by another witness. He testified, too, that he never saw or had conversed with Welter after so visiting the property with him until after he bought the property.

We do not think the evidence shows that plaintiff was the procuring cause of the sale.

Furthermore, the only evidence offered to connect Hedwig K. Johnson, the wife of Oscar, against whom judgment was also rendered, with the property in question was ruled out by the court.

The judgment therefore will be reversed, not only because of the insufficiency of the evidence to sustain the cause of action, but for failure to make proof of joint liability, and the cause will be remanded.

REVERSED AND REMANDED.

Gridley and Scanlan, JJ., concur.

321 - 31832

247 I.A. 621

NELLE QUIGLEY, Appellee, v. SAM COHEN et al., Appellants.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order entered January 11, 1927, overruling a motion to vacate a default judgment for $174.71 entered January 6th previous against appellants Rosenthal and Stockfish, the only two defendants served with summons.

No written appearance was filed for any of the defendants, and while continuances were had on three different occasions, the final one to January 6th, no one purported to appear for defendant Cohen before judgment.

On January 10th, a motion "in behalf of defendants" to vacate the judgment was made and overruled. On the following day a like motion, without affidavits to support it, was made and also overruled. It is from the latter order the appeal was taken and allowed.

There is nothing in the record to indicate upon what ground the latter motion was predicated. We cannot assume that it was presented on the same affidavits filed in support of the previous motion to vacate and therefore cannot say that the court abused its discretion in denying it.

As defendant Cohen was not served and did not specially appear it was not error to enter the judgment against the other two defendants.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

242 - 31853

247 I.A. 241

BOSWELL B. HARTMAN, Appellee, v. JOSEPH KRUSZKA, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to recover for labor and material furnished in digging a well on defendant's premises. The case was heard without a jury. The finding and judgment were for plaintiff in the sum of $420, the contract price.

Plaintiff urges as the first ground for reversal that there was no substantial compliance with the contract. The only alleged departure from the contract relied on and argued is that plaintiff dug the well some 13 feet further from defendant's kitchen door than was indicated by a stake placed by his brother Peter who acted as defendant's agent in the transaction.

The sole question is whether there was a modification of the contract or subsequent agreement to complete the work where the well was started. The only testimony relevant to that issue was given by plaintiff and Peter Kruszka. While there is some variance in the same we think it tends strongly to support plaintiff's contention that with respect to location the contract was modified.

Plaintiff testified that when he moved his machinery to the place for work no one was on the premises and the stake was gone, and he began digging as near to where the stake was

placed as he could recall; that two or three days later when he had dug some 50 feet Peter came and said the well was not where he wanted it, but that he had convinced defendant that it was in the best location as the original designation was too near a tree.

Peter testified that he at that time told plaintiff that he was digging in the wrong spot and that he would have to see defendant about it. He also testified that he did see defendant but did not deny plaintiff's testimony as to what he reported to plaintiff as the result of the interview, nor testify that defendant did not acquiesce in the change. It appears that he came to where plaintiff was working nearly every day afterwards and never made or reported any protest against plaintiff continuing to dig the well in that place. We think the court was justified in finding that there was a compliance with the contract as so modified.

In that view of the case it is not a question whether there was a waiver, or a wilful departure from the terms of the contract, as claimed by appellant.

Appellant also urges that plaintiff said the tree would be killed if the well were sunk where the stake was placed, and offered evidence to the effect that that would not be the case. Even if plaintiff so said, it amounted to a mere expression of opinion and could not be regarded as a fraudulent misrepresentation, as contended by appellant. There was no room in the evidence for such a theory of the case. Finding no reversible error the judgment will be affirmed.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

11 - 31647

CHICAGO TITLE & TRUST COMPANY, as trustee, etc., Defendant in Error,	ERROR TO CIRCUIT COURT, COOK COUNTY.
v.	
NATHAN S. SCHOENBROD, Plaintiff in Error.	

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This writ of error is sued out by defendant to reverse a decree of the circuit court, entered February 8, 1926, wherein the court adjudged that a certain written contract, executed by the parties on May 11, 1925, is "null and void," and is "removed as a cloud upon complainant's title," and that defendant and all persons claiming under him are perpetually enjoined from claiming any rights thereunder.

The prayer of complainant's bill, filed December 14, 1925, is (a) that the contract be declared null and void, (b) that it be removed as a cloud, etc., and (c) that a perpetual injunction issue, etc.

The contract is in the usual form. By it defendant agreed to purchase, and complainant (as trustee under Trust Agreement, No. 10,881) agreed to sell, certain described real estate in Chicago, for $44,000, subject to existing leases and a mortgage for $12,000 (due August 11, 1928) which the purchaser agreed to pay, and also subject to other conditions mentioned. The purchaser had paid $3,000 as "earnest money;" and agreed to pay $19,500, at the office of H. H. Harper & Co., Chicago, within 5 days after the title had been examined and found good or accepted by the purchaser, provided a sufficient deed was then ready for delivery; and further agreed to pay the balance of $9,500, on or before

August 1, 1928, to be secured by notes and mortgage. And there is the provision that "should said purchaser fail to perform this contract promptly on his part, at the time and in the manner specified, the earnest money paid as above shall, at the option of the vendor, be retained by him as liquidated damages, and this contract shall thereupon become and be null and void."

In the bill, after stating the making of the contract (copy attached) and complainant's ownership of the premises and its continued possession thereof, it is alleged that the consummation of the contract was deferred, repeatedly and from time to time, at defendant's request; that after its execution defendant went to Florida and did not return to Chicago until during November, 1925; and that on November 24, 1925, complainant causes to be served on defendant personally in Chicago a written notice.

A copy of this notice, signed by complainant and dated November 19, 1925, is attached to the bill and made a part thereof. In it, after describing the premises and mentioning the provisions of the contract, and the fact of the payment of the earnest money, defendant is notified that on Monday, November 30, 1925, at 10 o'clock A. M., complainant will, at the office of H. H. Harper & Co., Chicago, (being room 748 Marquette building), have ready for delivery and will tender to defendant a good and sufficient deed, conveying to defendant a good and merchantable title to the premises, etc., and will also have ready for delivery a merchantable title guaranty policy, with insurance in the amount of the purchase price, $44,000, and will also then tender to defendant the policy, all in fulfillment of the contract, "upon the concurrent payment by you of the balance of the purchase price, in accordance with the terms of said contract;" and it is further stated that defendant will be given reasonable time within which to examine the title as shown by the guaranty policy, and that the tender of the deed and policy

will be kept good for 5 days after the expiration of such reasonable time, etc.

It is further alleged in the bill that at the time and place mentioned in the notice complainant's agents were present with the papers for the purpose of making the tenders, etc.; that defendant did not then appear either in person or by agent; that he has not at any time since offered to perform the contract or sent any word to complainant respecting the same; that at all times since November 30th, and up to and including December 7, 1925, complainant was ready, willing and able to make the tender good, but defendant wholly neglected and refused to comply with the contract; that on December 8, 1925, complainant elected to terminate the contract and to retain the earnest money, and so notified defendant; that nevertheless defendant now claims that he still has rights in and to the premises by virtue of the contract; and that it and defendant's claim thereunder constitute a cloud upon complainant's title and hinder and prevent the sale thereof by it.

Service was had on defendant by delivering to him at Miami, Florida, a copy of the bill, etc. He did not appear and on January 29, 1926, his default was entered and the bill taken as confessed. The cause was referred to a master, who reported recommending a decree in accordance with the prayer of the bill. The court confirmed the report and entered the decree in question, in which, after making full findings of fact substantially in accord with the allegations of the bill, it further found that "the contract has been forfeited and determined in accordance with its terms;" that defendant has no right, title or interest in and to the land by virtue of the contract or otherwise; that complainant is entitled to retain the earnest money; and that the contract, and defendant's claims thereunder, "constitute a cloud upon complainant's title in and to the land, and hinder and prevent

the sale thereof by complainant."

On January 27, 1927, nearly a year after the entry of the decree, defendant sued out the present writ of error.

Defendant's counsel's only point, relied upon for a reversal of the decree, is that the circuit court had no jurisdiction over the subject matter, because it is not alleged in the bill, and does not affirmatively appear from the findings of the decree, that the contract in question ever was recorded in the recorder's office of Cook County. Counsel cites the case of Howe v. Hutchison, 105 Ill. 501, 505, where it is said: "As the agreement was not recorded in the county and State where defendant's lands are situated, it is a matter of no consequence to him whether the contract is cancelled or not. Unless made a matter of record it would be no cloud upon the title to his lands." Under the allegations of the bill, and the findings of fact contained in the decree complained of, we do not think there is any merit in counsel's point. Clearly the court had jurisdiction, under the particular facts, to cancel the contract and to declare it to be null and void, as the court did, and also to enjoin defendant, and all other persons under him, from claiming any rights under the contract. And, the court having properly cancelled the contract, defendant had no further interest in the premises and is in no position to complain of that portion of the decree, wherein the court ordered the contract to be removed as a cloud upon complainant's title. It is immaterial to defendant whether it is technically a cloud upon complainant's title or not.

The decree in question should be affirmed and it is so so ordered.

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

110 - 31718

E. M. WILLOUGHBY et al., Appellees,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
S. BUCHSBAUM & CO., a corporation, Appellant.	

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On January 16, 1925, plaintiffs commenced a 4th class action in contract against defendant in the Municipal court to recover $700, for services in making for defendant a written appraisal of the value of certain Chicago property and delivering the appraisal to a third party at defendant's request. On the trial, before a jury, defendant did not raise any question as to the reasonableness of the charge, but its defense was that the written document delivered was not an appraisal of the "leasehold estate" as requested, that it was of no use or value to defendant, and that, therefore, defendant was not indebted to plaintiffs in any sum. A verdict was returned in plaintiffs' favor for the full amount of their claim and, on October 15, 1926, judgment was entered against defendant and this appeal followed.

Under date of December 27, 1924, defendant wrote plaintiffs as follows:

> "This is to authorize you to make an appraisal at our expense on the <u>property</u> situated at the southeast corner of Washington and Wells streets, known as the Roosevelt Building. This appraisal is to be made for <u>loan purposes</u> and is to be given to the Hiney Emerson Co. and a copy to us. It is quite important that this appraisal be placed in the hands of the Hiney Emerson Co., not later than December 31st, the 30th if possible, as this loan is in quite a hurry, and the Hiney Emerson Co. wish to have the data passed the first of the year if possible."

Upon receipt of the letter plaintiffs immediately started in upon the work, completed it, and, under date of December 30th, sent their report or appraisal to Hyney-Emerson Co., and a copy to defendant. Accompanying the report was a letter in which plaintiffs wrote: "We have given full consideration to every element that would have any bearing on the value of the land and on the fair and sound value of the improvement. We trust that this report will cover fully and properly a fair value of this holding. We shall be pleased to respond promptly to your further wishes." The report is as follows:

> "We beg to submit to you our opinion of the value of the property known as the Roosevelt Building, situated at the Southeast corner of Washington and Wells Streets.
>
> This property, as a corner having a frontage of 81 feet on Washington Street and 60 feet on North Wells Street, together with the improvement thereon consisting of a ten story fireproof office building, we arrive at a value - - - - - - - - - - $700,000.
>
> In determining this appraisal we have considered the values as follows:
>
> Land, southeast corner Washington and North Wells Street, 81 x 60 feet - - $340,000
> Roosevelt Building - - - - - - - - - - - - - 360,000
> Total - - - - - - - - - - - - - - $700,000.
>
> Note: We find from the records that a lease was made on this property November 1st, 1921, for ninety-nine years, as follows:
>
> $15,000 for three years
> 18,000 for three years
> 20,000 for five years
> 25,000 for twenty-five years
> 30,000 for the balance of the term."

It further appears that after the report was received Hyney-Emerson Co. decided not to make any loan on the property as had been requested. Earl Austin, secretary of the company and whose duty, among other duties, was "to review any bond issues offered to the house for purchase," testified that he read the report and "took up the matter with Mr. Hyney, the president, and said this showed a total value on the land and buildings of $700,000, and I presume,

therefore, that we would not be interested in making a loan on the property of something like $300,000, when the value of the land and building was $700,000, not considering the leasehold." No additional report, or more specific appraisal of the value of the leasehold estate, was requested of plaintiffs by either Hyney-Emerson Co. or defendant. Evidently the report as submitted had served sufficiently the purpose for which it had been ordered, though probably it was not in accord with the hopes and desires of defendant. Thereafter, according to the testimony on cross-examinati of Fred J. Tucker, plaintiffs' representative, he (Tucker) made sever unsuccessful efforts to collect from Herbert Buchsbaum, an officer of defendant, plaintiffs' bill for the services rendered, and on one occasion Buchsbaum made an offer to settle it for a less amount than its face, which settlement plaintiffs refused.

The main contention of defendant's counsel is that the verdict and judgment are manifestly against the weight of the evidence. The contention is based upon certain testimony, introduced by defendant over plaintiffs' objection, tending to show that in the preliminary negotiations, and between Tucker and Buchsbaum leading up to the writing of defendant's letter of December 27, 1924, it was agreed between them that plaintiffs should appraise the value of the leasehold. The letter does not direct plaintiffs so to do, but what plaintiffs are authorized and directed to do is stated explicitly and without any uncertainty or ambiguity. We think the trial court was in error in allowing testimony of this character to be heard by the jury. It is well settled in this State that all conversations and parol agreements had between the parties prior to the making of a written agreement, which is certain and not ambiguous, are merged in the writing and cannot be proved for the purpose of altering the agreement as in the writing expressed or showing a different intem-

tion. (Armstrong Paint & Varnish Works v. Continental Can Co., 301 Ill. 102, 108; Osgood v. Skinner, 211 id. 229, 238.) But, even if it be considered that this testimony, rather than said letter, showed what was the real agreement and intention of the parties, still we cannot say that the verdict is manifestly against the weight of the evidence. There was testimony introduced in plaintiffs' behalf showing that, from the statements and figures contained in the report or appraisal, the value of the leasehold could easily be ascertained by those accustomed to figuring values of leaseholds on long term leases (as defendant and Hynes-Emerson Co. were), where are given the total value of the land and building thereon, the value of each, the period the lease has yet to run, the rentals to be paid during different periods of the life of the lease, the character of the building and the location of the property; and that said leasehold, as such and considering all the elements thereof, had little or no value and perhaps might then be a liability rather than an asset.

Defendant's counsel urge that the court erred in the admission of certain evidence offered by plaintiffs and in the exclusion of certain other evidence offered by defendant. We do not think that the court committed any error in these particulars, but, if errors there were, they clearly were not prejudicial to defendant or ground for a reversal of the judgment. Nor do we think that the court maintained an hostile attitude towards the defendant, or made any prejudicial remarks in the jury's presence, as is also urged. We think that the jury's verdict was right and amply sustained by the evidence, and that the judgment should be affirmed.

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

21 - 31791

W. F. REED, Defendant in Error, v. PENNSYLVANIA RAILROAD COMPANY, a corporation, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE HARTLEY DELIVERED THE OPINION OF THE COURT.

On July 29, 1925, plaintiff commenced an action of the 4th class in the Municipal court to recover damages to certain cattle, transported between points within Illinois. After issues joined the cause was dismissed, on October 5, 1926, for want of prosecution on a regular call of the calendar and judgment rendered against plaintiff for costs. More than 30 days thereafter, on November 24, 1926, plaintiff appeared and moved the court to vacate said order of dismissal and the judgment in favor of defendant and to re-instate the cause. The motion was supported by the affidavit or petition of one of plaintiff's attorneys. It did not disclose any facts or grounds, as mentioned in section 41 of the Municipal Court Act, warranting the court in reinstating the cause. Yet the court ordered that said judgment of October 5th be vacated and set aside and that the cause be reinstated for trial. To reverse this order defendant sued out the present writ of error. No brief has here been filed by plaintiff.

As plaintiff did not in his motion to set aside the judgment of October 5th (made more than 30 days after its entry) state such facts or grounds as provided by said section 41, the court was without jurisdiction to order that said judgment be vacated and the

cause be reinstated, and the present proceeding to reverse the order is proper. (Section 21, Municipal Court Act; Cramer v. Illinois Commercial Men's Association, 260 Ill. 516; Gallay v. Mathis, 195 Ill. App. 170; American Surety Co. v. Bliss, 214 Ill. App. 463.)

Accordingly, said order of November 24, 1926, vacating and setting aside said judgment of October 5th, and reinstating the cause, is reversed.

REVERSED.

Barnes, P. J., and Scanlan, J., concur.

185 - 31796

A. A. STURGES, Jr., WALTER GULLEY and L. A. STURGES, trustees, doing business as DAD'S COOKIE COMPANY, Appellants,	APPEAL FROM
v.	SUPERIOR COURT,
FRANK E. DAVIS, GEORGE L. SHAEFFER, THOMAS R. DULLANTY, JULIA FOY DAVIS, CHESTER C. HOE and FLEXALL COOKIE COMPANY, Appellees.	COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On August 20, 1924, complainants, engaged in the business of manufacturing and selling oatmeal cookies at Los Angeles and Oakland, California, filed a bill in the Superior court of Cook County against defendants for an injunction and an accounting. The bill charged that defendants wrongfully had appropriated and were using in their business in Chicago, a process, recipe or formula for making such cookies which was complainants' trade secret in use by them, and which had previously been taught to defendants, Frank E. Davis and George L. Shaeffer, while they were in complainants' employ. After answers filed the cause was referred to a master to take proofs and report the same together with his findings. After hearing much evidence, the master filed a report recommending that the bill be dismissed for want of equity. On December 8, 1926, upon exceptions, the court entered a decree in accordance with the recommendation and complainants appealed.

Since March, 1924, complainants have been engaged in the manufacture and sale of oatmeal cookies, under the name of "Dad's Cookie Company." For several months prior thereto two of the complainants, A. A. Sturges, Jr., and Walter Gulley,

copartners as Gulley and Sturges, were engaged in the same business at Los Angeles. Complainants claim that while this partnership was in existence Gulley originated the particular oatmeal cookies (which are the subject of the present controversy) and placed them upon the market, where they became popular, etc. During March, 1922, in compliance with the statutory law of California, complainants became associated together, as trustees, for the purpose of succeeding to, owning and thereafter conducting the business of the copartnership, which it sold and assigned to them as well as all its rights and property including said process, recipe or formula. Thereafter complainants limited their business to the manufacture and sale of said particular oatmeal cookies, and established and operated two factories at Los Angeles and Oakland and expended large sums in their equipment and maintenance, and in advertising. During March, 1921, the defendant, Frank E. Davis, was engaged in business selling bakery products at Los Angeles and he sold to his customers the particular cookies manufactured by the copartnership. After complainants became organized, Davis, in March, 1922, gave up his business, paid to complainants $3300 in cash for the part purchase price of certain stock in the complainant organization, and became a salaried employee thereof, as well as having an interest in the business because of such purchase. Complainants used this $3300 in the construction of the Oakland factory, and, after its completion, Davis changed his residence to Oakland, was made fully acquainted with the process or recipe, and was taught how to purchase the necessary ingredients, to prepare the same for baking and to make cookies in accordance with the process or recipe. Davis continued in this employment until February, 1923, when, because of differences and disputes arising, he resigned. He previously had commenced suit against complainants and others. This suit

was compromised and settled. Davis was paid $3300 and he assigned and transferred to complainants all his interest as a stockholder in the complainant organization. Davis shortly thereafter came to Chicago, where he caused to be organized the Flexall Cookie Company, an Illinois corporation, which has since been engaged in Chicago in the manufacture and sale of oatmeal cookies. The defendant, George L. Shaeffer, also had been an employee of complainants, in the Oakland Factory, at the same time as Davis, and had been made acquainted with complainants' process or recipe. He ceased working for complainants and followed Davis to Chicago. The defendant, Thomas F. Sullanty, had been a salesman for complainants at Oakland, and he resigned his position in April, 1923, and came to Chicago. Davis, Shaeffer and Sullanty are all interested in the business of the Flexall Cookie Co. Julia Fay Davis is the wife of Frank E. Davis.

On the hearing complainants' principal witness was Walter Gulley. They also called as their witnesses the defendants, Davis, his wife, Shaeffer and Sullanty. Louis E. Hinkelman, engaged in the manufacture of oatmeal cookies at Cleveland, Ohio, also testified for them. Defendants' principal witnesses were Davis, George L. Teller, a Chicago chemist, and Raymond J. McTaggart. There was introduced in evidence complainants' recipe or process for making their cookies; also defendants' recipe or process for making their similar cookies; also a written comparison of the two recipes or processes. The master states that he found this comparison of considerable assistance in determining the issues. He directed particular attention to the differences that existed between the two recipes or processes, and to the testimony of Gulley, to the effect that, "if different proportions of the ingredients contained in his recipe are used, there would be a difference, and a different cookie would result in the baking thereof." The master said that he had had difficulty in reconciling some of the conflicting statements made by opposing

witnesses who are parties to the suit and interested in its outcome; but that he placed great reliance upon the testimony of defendants' witness, McTaggart, who apparently was not interested in the outcome of the suit, and who "had much to do with originating the cookie, which is the subject matter of the litigation, and developing it to its present state of perfection."

McTaggart's testimony is to the effect that he is now engaged at Long Island City, New York, in the manufacture of oatmeal cookies under the name of "1-4-U Cookie Co."; that he had worked at the baker's trade for many years in various cities, including Los Angeles, Chicago, Philadelphia and New York; that he first met Gulley in 1908, in Santa Ana, California, while he (McTaggart) was working there as bakery foreman for a confectionery company; that Gulley (then about 17 years of age) worked under him for about two years and he assisted in teaching Gulley the baker's trade; that he next met Gulley in Los Angeles in 1919, when Gulley owned and was running a bakery in that city; that Gulley then said that he had a good recipe for making oatmeal cookies, which he had obtained from one Miller, and told the witness how to follow the recipe and made a batch of cookies in his presence; that this recipe differed in some respects from the one which Gulley used later; that he worked as an employee of Gulley in 1921, and devoted his entire time to making oatmeal cookies; that the recipe then used was the same which Gulley had shown and demonstrated to him in 1919; that he continued to work for Gulley for about three years and was with him when the name of Gulley's company became the "Mad's Cookie Company"; that some changes were made in the recipe during his said employment, which were suggested by him, viz., using the water that came from the raisins, using butter flavor, using the crumbs of old cookies, soaking the oatmeal in water before using, etc.; that aside from

these changes the recipe was substantially the same as that which Gulley originally had obtained from Miller; that other bakery concerns, where he had worked from time to time, made similar oatmeal cookies, among them the "B & B Bakery" of Los Angeles; that a man named Anderson, in business in Los Angeles, uses a recipe similar to complainants'; and that Anderson told him (McFaggart) that he had obtained the recipe which he still uses in his business from said Miller, who still is in business as a baker in Santa Ana.

On the hearing, also, there were read in evidence numerous recipes for making oatmeal cookies, contained in cook books and found in two public libraries in Chicago. Although these recipes differ in some respects from each other, and from complainants' recipe, all are essentially the same. The evidence also showed that although there was considerable similarity between complainants' and defendants' recipes, nevertheless differences existed.

The master found that, although the idea of defendants manufacturing and selling oatmeal cookies may have resulted from the former association of Davis and Shaeffer with complainants, yet the evidence disclosed that complainants' recipe was not a "trade secret;" that "the process of manufacture and the recipe used by complainants in its essential features was known and used by the outside world before complainants made use of it;" and that "such process was and can successfully be worked out and used by a good knowledge of chemistry and the baking industry and by information furnished from cook books found in public libraries."

After carefully reviewing the evidence, and some of the authorities cited by respective counsel, we are of the opinion that the findings and recommendations of the master, and the decree appealed from, were fully warranted. In Victor Chemical Works v.

Iliff, 299 Ill. 532, 545-6, the following definitions are given:

> "A trade secret is a plan or process, tool, mechanism or compound known only to its owner and those of his employees to whom it is necessary to confide it."
>
> "A process is a mode of treatment of certain materials to produce a given result. It is an act, or a series of acts, performed upon the subject matter to be transformed and reduced to a different state or thing. * * The process requires that a certain thing should be done with certain substances and in a certain order."

In the Iliff case (p. 546) it is said: "A mere mechanical advance in the use of a process is not a new process or discovery. To be a new process there must be employed creative faculties in originating it, amounting to a meritorious discovery or invention." In that case, as in the present, there was evidence tending to show that the party claiming to have a trade secret exercised caution in protecting it. And it is further said in that case (p. 547): "Proof of the above character is sometimes treated by the authorities as going a long way in the proof that a given thing is a trade secret, but such proof, alone, cannot be held to establish that the process is secret when it is known and used by the outside world and can be successfully used by use of published chemical literature on the subject." While our Supreme Court in that case recognized the rule that courts of equity will in a proper case restrain an employee from making disclosures or use of trade secrets communicated to him in the course of a confidential employment, still the Court says (p. 548) that "the burden of proof in such a case is upon the complaining party"; and further says, in reference to the particular facts disclosed: "To be entitled to relief * * complainant was required to prove that it was using the process of manufacture disclosed in exhibit 6, and that it was a trade secret; that it was of value to it and important in the conduct of its business; that by reason of discovery or ownership it had the right to use and

Illig, 295 Ill. 526, 529, the following definitions are given:

> "A trade secret is a plan or process, tool, mechanism or compound known only to its owner and those of his employees to whom it is necessary to confide it."
>
> "A process is a mode of treatment of certain materials to produce a given result. It is an act, or a series of acts, performed upon the subject matter to be transformed and reduced to a different state or thing. * * * The process requires that certain things should be done with certain substances and in a certain order."

In the Illig case (p. 530) it is said: "A mere mechanical advance in the use of a process is not a new process, or discovery. It is a new process [illegible] originating [illegible] In that case, as in the present, there was evidence tending to show that the party claiming to have a [illegible] in protecting it. [illegible] (p. 533): "Proof of the above character [illegible] as going a long way in the proof [illegible] but such proof, alone, cannot be said to establish that the process is secret when it is known and used by the public and can be successfully used by one of [illegible] on the subject." [illegible] that courts of equity will in a proper case restrain an employee from making disclosures of any of the secret processes communicated to him in the course of a confidential employment, [illegible] says (p. 533) that "the burden of proof is upon the complaining party, and [illegible] facts disclosed. [illegible] required to prove that at the time [illegible] closed in exhibit 3, [illegible] value to it and [illegible] reason of discovery [illegible] the right to use and

enjoy the trade secret; and that the secret was communicated to Iliff while he was employed and under contract and in a position of trust and confidence, under such circumstances as to make it inequitable and unjust for him to disclose the secret to others and make use of it to complainant's prejudice. It has failed to prove the first and essential element of its case, - that its process is a trade secret. It must, therefore, necessarily fail to recover in this suit."

We think that these holdings are particularly applicable, to the facts of the present case. A further holding in the Iliff case is also applicable. The Court says (p. 551): "The contract is one in restraint of trade and void. * * The proof does not show that complainant has any trade secret whatever."

The decree of the Superior court should be affirmed and it is so ordered.

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

MARY E. FURMAN, Plaintiff in Error, v. CHICAGO RAILWAYS COMPANY and CHICAGO CITY RAILWAY COMPANY, corporations (which with the Calumet and South Chicago Railway Company and Southern Street Railway Company are doing business under the name and style of Chicago Surface Lines) and HAMMOND, WHITING AND EAST CHICAGO RAILWAY COMPANY, a corporation, Defendants in Error.	ERROR TO SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Mary E. Furman, plaintiff in error, hereinafter called the plaintiff, sued the Chicago Railways Company et al, defendants in error, hereinafter called the defendant, in an action of trespass on the case for personal injury. The case was tried before the court, with a jury, and there was a verdict of not guilty. Judgment was entered on the verdict and this appeal followed.

The sole ground urged for reversal of the judgment is that the court erred in giving two instructions to the jury at the request of the defendant.

The first instruction reads as follows:

> "You are instructed that while it is a general rule of law where a person is riding merely as a passenger in a vehicle which is being driven by another and where such passenger has nothing to do with its management or control, that then the negligence of the driver of such vehicle cannot be imputed to such mere passenger; but if the jury believe from the evidence and under the instructions of the court that the plaintiff, at the time and place in question, saw the street car in question approaching upon the west-bound track in 91st street while the automobile in which she was riding

> was going north in Exchange avenue, and that she saw and knew that the driver of said automobile was about to drive upon said west-bound track in front of the approaching car and into a position of danger and that the plaintiff then did not give the driver of said automobile any warning of such danger and made no attempt to do anything for her own safety and protection, then in such case you are instructed, if you believe from the evidence that she did so fail to give such warning and did so fail to do anything for her own safety and protection and if such failure on her part, if you believe from the evidence she did so fail, was negligence on her part which caused or proximately contributed to cause the accident and injury complained of in this case, then the plaintiff cannot recover and you should find the defendants not guilty."

The case involved a right angle collision between an automobile and a street car. The automobile was owned by the husband of the plaintiff and was being driven by him at the time of the accident. The plaintiff sat in the rear seat of the automobile. The plaintiff's counsel has argued strenuously that the giving of the above instruction was error and that the verdict of the jury was the result of the law stated in the instruction as to the duty of a mere passenger in an automobile. In the case of Fienta v. Chicago City Ry. Co., 208 Ill. App. 309, the defendant offered to the trial judge an instruction substantially the same as the one now before us. The trial judge modified the instruction and gave it to the jury as modified. The counsel for the defendant on appeal contended that the instruction as offered correctly stated the law and that the modification of the same was error. In this court the judgment of the lower court was affirmed. The case was appealed to the Supreme Court and that court in Fienta v. Chicago City Ry. Co., 284 Ill. 446, 453, held that the instruction as offered stated the law correctly and that the modification by the trial court was error. The ruling in that case has been followed in Opp v. Fryer, 194 Ill. 338, and Griffenham v. Chicago Rys. Co., 299 Ill. 590. We must therefore hold that the giving of the instruction in the instant case was not error.

The second instruction reads as follows:

> "The weight of the testimony does not necessarily depend on the greater number of witnesses sworn on either side of a question in dispute, but in determining upon which side the preponderance of evidence is, the jury may take into consideration the number of witnesses testifying upon one side or the other of a disputed point, the opportunities of the several witnesses for seeing or knowing the things to which they testified; their conduct and demeanor while testifying; their interest or lack of interest, if any, in the result of the suit; the probability or improbability of the truth of their several statements; and from all these circumstances, together with all the other facts and circumstances appearing from the evidence upon the trial, determine upon which side is the greater weight or a preponderance of the evidence; and if you believe from the evidence, under the instructions of the court, after considering all the facts and circumstances appearing in evidence, and the number of witnesses testifying on the respective sides of this case, that the evidence of the lesser number of witnesses on the one side is more credible and trustworthy and outweighs the evidence of the greater number of witnesses on the other side, then the evidence preponderates on the side of the lesser number of witnesses." (Italics ours.)

It appears that the plaintiff had the greater number of witnesses testifying to the accident and her counsel complains of the italicized portion of the above instruction and contends "that witnesses are counted by numbers only as they testify on one side or the other of the disputed issues of a case" but that by the italicized portion of the above instruction witnesses are counted by sides in determining the preponderance. If the italicized portion of the instruction stood alone the giving of the same would be error and it must be conceded that the instruction as it was given is not free from criticism, but it appears to us that the jury in hearing or reading the entire instruction must have understood that part of the instruction wherein it states "the number of witnesses testifying on the respective sides of this case," as meaning the respective sides of questions in dispute in the case. Instructions containing language similar to that complained of have been held not to be misleading. (C. & A. R. R. Co. v. Fisher, 141 Ill. 614, 626;

Gage v. Eddy, 179 Ill. 492; Gordon v. Adelman, 302 Ill. App. 255, 282-3; Osberg v. Cudahy Packing Co., 198 Ill. App. 501 (certiorari denied by the Supreme Court.)

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

127 - 31736

ASHLAND BOULEVARD HOSPITAL, Inc., Appellant, v. WILLIAM HADESMAN et al., Appellees.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On January 29, 1925, William Hadesman filed a bill of complaint in the Circuit Court (No. B-117041) against the Ashland Boulevard Hospital, Inc., (hereinafter called the Hospital) and others, to foreclose a trust deed on certain property of the Hospital, given to secure a promissory note in the sum of $40,000, dated July 30, 1924, and signed by the Hospital. On February 3, 1925, the Hospital filed a bill of complaint in the same court (No.B-117154) against William Hadesman and one Albert Feigenbaum, asking that the note for $40,000 be decreed to be cancelled and held to be null and void, and that Hadesman and Feigenbaum be enjoined from foreclosing or attempting to foreclose a certain chattel mortgage executed by the Hospital on or about July 30, 1924, and for other relief. Answers were filed, and on March 14, 1925, William Hadesman filed a cross-bill in the above mentioned cause (No. B-117154), praying, among other things, that the Hospital be decreed to pay the sum due on the $40,000 note, and in default that the mortgaged property be sold under the chattel mortgage. Thereafter the Hospital filed an answer to the cross-bill of Hadesman. Various answers and replications were filed, and an order was entered that the two cases (B-117041 and B-117154) be consolidated and referred to a

master in chancery to take proofs of the respective parties, make his findings of fact and report his conclusions of law to the court. Thereafter the master's report, together with the evidence taken before him, was filed. The master found (*inter alia*) the equities with William Hadeaman and against the Hospital, and recommended that the bill of complaint of the Hospital (B-117154) be dismissed, and that the prayer of the bill of complaint of William Hadeaman (B-117041) for foreclosure under his trust deed and the prayer of William Hadeaman, cross-complainant, (B-117154) for foreclosure under his chattel mortgage, be granted.

The chancellor found that there was due and owing to the complainant the following: "1. Amounts disbursed by him for said Ashland Boulevard Hospital, Inc., between July 30, 1924, and September 25, 1924, as aforesaid, $17,000.00; 2. Amount of compensation to which said William Hadeaman is entitled for his services as aforesaid, $8,000.00; 3. 6% interest on said $25,000.00 from September 25, 1924, to January 29, 1925, $316.44; 4. 7% interest on said $25,000.00 from January 30th, 1925, to date of entry of this decree, $3,276.50; 5. Necessary outlays, expenses and disbursements advanced by said William Hadeaman as aforesaid, $381.75; 6. Solicitor's fees as aforesaid, $2,500.00; 7. Master's fees advanced by said William Hadeaman, $250.00; 8. Stenographer's charges advanced by said William Hadeaman herein as aforesaid, $138.50; 9. Guardian *ad litem* fees, $25.00; 10. That there is also due to said William Hadeaman the costs and expenses of these proceedings." The chancellor sustained the master in all respects save one. The master refused to allow the $8000 for compensation; the chancellor allowed it. A decree of foreclosure was entered and this appeal followed.

The Hospital makes twelve points against the decree. Contentions numbered one, two, three, seven, eight and nine are predicated upon the assumption that the $40,000 note and the trust deed securing the same were cancelled by the complainant. The master and the chancellor found that no money or other valuable consideration was ever paid or delivered to the complainant in payment or satisfaction of the note for $40,000 and that it was still in full force and effect and the property of the complainant. After a careful examination of the evidence we are of the opinion that any other finding would not have been justified. It is clear that after the complainant received the note and trust deed in question the Hospital undertook a refinancing plan through the firm of Du Pont, Kempthorn & Company (conducted by Albert Weigenbaum, defendant) investment and securities brokers. The plan of financing contemplated the issuance and sale by the Hospital of $60,000 worth of bonds and a certain amount of stock, and that the proceeds from the sale of the bonds and stock were to be first applied in payment of the $40,000 note, and on August 25, 1924, the Hospital executed 230 bonds for the aggregate sum of $60,000 and a trust deed to secure the same, and the Chicago Title & Trust Company was named as trustee. In connection with the plan the services of the Trust Company were secured and the head of the escrow department of the Company drew up the following "escrow" agreement:

"Chicago
September 25, 1924

Chicago Title and Trust Company:

William Hadesman deposits herewith trust deed dated August 25, 1924, signed by the Ashland Boulevard Hospital, Inc., and bonds numbers 1 to 230 inclusive, secured thereby aggregating $60,000.

The said Hadesman also deposits cancelled trust deed recorded as document No. 8533740, and cancelled note for $40,000 secured thereby.

The above described bonds are to be delivered to Albert Feigenbaum in lots of the par value of $5,000 or more, upon payment to you of 80% of the par value of said bonds plus accrued interest as shown on statements accompanying said payments, each statement being approved in writing by William Hadesman. Said payments are to be remitted at once to William Hadesman.

The trust deed first above described and release of trust deed document No. 8533740, are to be filed for record as soon as the trust deed and bonds secured thereby have been certified by the Chicago Title and Trust Company, Trustee.

When and if there has been paid to William Hadesman a total principal sum of $40,600 (Forty thousand six hundred) the balance of said payments as made are to be remitted to the Ashland Boulevard Hospital, Inc.

The Chicago Title and Trust Company is hereby relieved of any liabilities contingent upon the title of the makers of the trust deed first above described.

If principal sums aggregating $40,600 are not paid to you on or before October 30, 1924, then the balance of the bonds then remaining in this escrow shall be delivered to William Hadesman upon demand, and the Chicago Title and Trust Company is relieved of all liability in so doing.

Albert Feigenbaum.

Wm. Hadesman
By J. Hadesman

~~Received subject to the above instructions~~
~~Chicago Title and Trust Company~~
~~Escrow Department~~
By H. W. Cooley.

Escrow No. 52274."

It will be noted that the escrow was not signed by the Hospital. The head of the escrow department testified that the agreement was never signed by anyone on behalf of the Hospital.

Two hundred and thirty bonds of the Hospital in the total amount of $80,000 and a trust deed securing the same were deposited with the Trust Company by Feigenbaum. The complainant deposited with the Company the $40,000 note and the trust deed securing the same, and the note and trust deed were then marked "Cancelled" with the cancellation stamp of the Company. No release of the trust deed was deposited with the Company by the

complainant. It appears that the trust deed to secure the bond issue for $60,000 was not in a form satisfactory to the Company and it refused to certify the issue. The Hospital was asked by it to correct the trust deed but, apparently, it did nothing in this regard and the bond issue was never certified to by the Company. In November, 1914, the Company returned to the complainant his note and trust deed for $40,000 and on the advice of the head of the escrow department the complainant marked on the note and trust deed "Cancelled in Error." It is clear from the proof that the perforation mark "Cancelled" was placed upon the $40,000 note and trust deed with the intent that it be given no legal effect until the Chicago Title & Trust Company made its certification. This was a condition precedent to the cancellation becoming effective. No bonds or stock were sold; the bonds are still in the hands of the Trust Company; the obligation of the Hospital to the complainant remains unpaid, and under the facts of this case it seems idle to argue in an equitable proceeding that the cancellation mark tended in any way to discharge the note.

In the Hospital's contentions numbered five and six it is argued that "even independently of the Negotiable Instrument Law and even aside from the deliberate cancellation of the $40,000 note and trust deed there was a complete novation by the cancellation of the $40,000 note and trust deed and the substitution therefor as a form of obligation of the $30 bonds and Trust deed securing same," and that "the novation of securities releases the pledge of the old security."

In plaintiff's brief certain cases are cited in support of these contentions, but we find not a single reference to the evidence in the case. In the reply brief of the Hospital some slight reference is made to the proof in support of the contentions.

Whether the $60,000 bonds and the trust deed securing them were delivered to Hadeaman in discharge, payment or satisfaction of the obligation of the Hospital to Hadeaman, was largely a question of fact. In support of its contention the Hospital apparently relies upon the language of the escrow agreement and the alleged cancellation of the note and trust deed by the complainant. The master found that there had been no cancellation of the $40,000 note and trust deed by the complainant and that he received no money or other property, payment, discharge or satisfaction of the note and trust deed for $40,000. These findings were approved by the chancellor and we are satisfied that they were fully warranted by the facts and circumstances of the case. While it is true that the document recites that the complainant deposited with the Trust Company the 230 bonds, as a matter of fact, Feigenbaum deposited them. In the bill of complaint filed by the Hospital it is alleged that under the contract between Feigenbaum, doing business as Du Pont, Kempthorn & Company, and the Hospital, dated July 28, 1924, "it was further understood and agreed that all securities to be sold should be placed with the said William Hadeaman to act as transfer agent, and that the said securities should be properly signed for transfer to purchasers before delivery to said transfer agent, it being understood that the said Albert Feigenbaum should pay the said transfer agent eighty cents for every dollar's worth of stock delivered to purchasers." Said bill also alleges that Feigenbaum was to have the exclusive sale of the securities for ninety days, and that if he failed to carry out his obligations under the contract the Hospital had the right to cancel the same at any time after ninety days. The ninety days expired October 28, 1924. The provision in the escrow agreement that on or before October 30, 1924, the bonds remaining in escrow should be delivered to the complainant upon demand

clearly meant, under all of the circumstances of this case, that they should be delivered to him as the transfer agent of the Hospital. The provision in the escrow agreement that "when and if there has been paid to William Hodesman a total principal sum of $40,600 (forty thousand six hundred dollars) the balance of said payments as made are to be remitted to the Ashland Boulevard Hospital, Inc.," is clearly inconsistent with the theory of fact of the defendant that the bonds and trust deed were delivered to the complainant in payment of the $40,000 note and trust deed or in lieu thereof as complainant would have been entitled to all of the proceeds realized from the sale of the bonds under such theory. In addition, Dr. Mangetti, the president of the hospital, testified that the complainant was to retain his lien under the $40,000 loan until the proceeds of the refinancing plan paid off the $40,000. The escrow agreement was not signed by the Hospital and it does not purport to state the exact relationship existing between the complainant and the Hospital. The action of the Trust Company - that drafted the escrow agreement - in returning the $40,000 note and the trust deed to the complainant is a very significant circumstance in determining the present contention. The decree expressly finds that "neither said two hundred thirty (230) bonds nor said trust deed securing the same represent any obligation or indebtedness of said Ashland Boulevard Hospital, Inc." The intent of the Hospital to obligate itself by the trust deed and bonds failed when the Trust Company refused to make its certificate and the Hospital has the right to obtain possession of them any time it sees fit.

The Hospital in its fourth contention argues that the allowance of $8000 to the complainant as compensation for his services should not be sustained by this court, and in support of the contention the counsel argues that "the allowance of the $8,000 over and above legal interest and interest on such $8,000

is clearly usurious, oppressive and inequitable." The Board of directors of the Hospital, at a special meeting held July 30, 1924, passed a resolution that dealt with the matter of the loan the Hospital was about to secure from the complainant. In the resolution it is recited "that out of the proceeds of said loan of $40,000 the said William Hadesman be and is hereby authorized for, and on behalf of this corporation, and in its name or otherwise, to adjust, pay, compromise, settle and discharge, in any manner whatsoever, the existing encumbrances, claims, liens, judgments of every kind, nature and description, in order to make said loan above mentioned of $40,000 a first mortgage upon said premises and for such amounts as he may deem desirable and proper, and use the proceeds of said $40,000 to make payment of said settlements and adjustments, and the balance of said $40,000 the said William Hadesman be and is hereby authorized to retain as compensation for his services in making such setelements and adjustments and for the payment to the agents obtaining this loan for their services, as well as for the payment of attorney's fees in connection with the negotiating of this loan, and other expenses incurred in connection therewith." The chancellor found that the complainant had rendered the services called for by his agreement with the Hospital and that for his services and expenses in accordance with the provision of the said resolution he was entitled to, as compensation, $8,000, that being the difference between $40,000 and the amount laid out and expended by him for and in behalf of the Hospital and the amount set apart and reserved by him to insure the payment of the amount of the first mortgage on the hospital when the same matured. As to the claim that the allowance of the $8,000 was usurious, it would seem sufficient to say in answer thereto that section 6, sub-

section 7, of the General Corporation Act, in force July 1, 1919, provides as follows: "Each corporation organized under this Act shall, subject to the conditions and limitations prescribed by this Act, have the following powers, rights, and privileges: (7) To borrow money at such rate of interest as the corporation may determine without regard to or restrictions under any usury law of this State, and to mortgage or pledge its property, both real and personal, to secure the payment thereof." The master recognized the force of the statute but refused to allow the $8000 on the grounds "that the complainant in a court of equity must do equity to obtain equity, and that the complainant was not entitled to the $8000." The chancellor disagreed with the master in this respect, and after a very careful consideration of the question we have reached the conclusion that the chancellor was justified in his ruling. There is no claim that fraud was practiced upon the Hospital and it dealt at arm's length with the complainant, and by the agreement it made with him, entered into pursuant to the resolution of its board of directors unanimously passed, agreed to pay him the $8,000 as compensation for his services. The complainant performed his part of the contract and we cannot say that the agreement, in view of all of the circumstances in this case, was an unconscionable or oppressive one. At the time the resolution was passed all of the directors seemed to consider the agreement in question an advantageous one to the Hospital. The record shows that during its dealings with the complainant the Hospital had as its legal adviser an experienced and able attorney.

By contention numbered eleven the defendant argues that the complainant failed to take up the $15,000 trust deed outstanding on the property and that the taking up of this lien was a condition precedent to his right to recover on the note in question. As to this contention the master and the chancellor both found that the $15,000 mortgage had not matured and that the holder of the same

refused to accept payment of the amount owing thereon; that the complainant endeavored to pay off the amount of said mortgage and that he, with the knowledge and consent of the Hospital and to insure the payment of the amount of the said mortgage when the same matured, set apart and reserved $15,000 of the amount loaned by the complainant to the Hospital. We think the finding justified the proof.

In the Hospital's contention numbered twelve it is argued that the physical and undisputed facts in the case sustain the theory of fact of the Hospital that the $40,000 loan was a temporary one and that the note securing the same was to be cancelled upon the delivery of the 230 bonds and the trust deed securing the same. That we have heretofore said in passing upon other contentions of the Hospital disposes of this contention, and adversely to the Hospital.

After a patient consideration of the many points raised by the defendant in this case, we are satisfied that the decree of the Circuit Court should be and it is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

204 - 31315

J. S. SMITH, Plaintiff - Appellee, v. MORRIS SIMON, Defendant - Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MCANLAN DELIVERED THE OPINION OF THE COURT.

The plaintiff, J. S. Smith, brought suit in the Municipal Court in a fourth class case against the defendant, Morris Simon, to recover $450 as real estate commissions. There was a trial before the court with a jury, and a verdict was returned in favor of the plaintiff in the sum of $450; judgment was entered on the verdict, and this appeal followed.

The defendant contends that the verdict and judgment are manifestly against the weight of the evidence, and after a very careful examination of the record we are satisfied that this contention is meritorious. When the sworn pleadings and the documentary evidence are considered with the oral testimony, the verdict of the jury cannot be justified.

The judgment of the Municipal Court should be and it is reversed and the cause is remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

211 - 31822

DURAND-McNEIL-HORNER COMPANY, a corporation, Appellant, v. MAX ZWEIGENBAUM, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The appellant, Durand-McNeil-Horner Company, sued Max Zweigenbaum, the appellee, in the Municipal Court of Chicago, in assumpsit, alleging that the appellee was indebted to the appellant on a balance due upon an open account for merchandise, in the sum of $972.33. The appellee admitted receiving from the appellant merchandise to the amount of $972.33, but claimed that he had paid the appellant $1000 on the account and that the appellant was indebted to him in the sum of $27.61, for which amount the appellee filed his set-off. The appellant admitted the receipt of the $1000 but claimed that it was paid on a different account.

The case was tried before the court and a jury, and a verdict was returned in favor of the appellee on his set-off, and assessing his damages in the sum of $27.61. Judgment was entered on the verdict and this appeal followed.

The appellant contends that the verdict is against the weight of the evidence. A jury in a former trial also found the issues against the appellant. We have very carefully considered all the evidence in this case and we are satisfied that we cannot find that the present verdict is manifestly against the weight of the evidence.

The following instruction offered by the appellant was marked "refused" by the court and the appellant contends that the court erred in not giving the same to the jury:

> "The court instructs the jury that it is incumbent upon the defendant, Zweigenbaum, to prove by a preponderance or a greater weight of the evidence, that he paid to the plaintiff the sum of $1,000 to be applied upon a running account and unless the jury is convinced from all of the evidence that the defendant so paid the moneys to the plaintiff on the said account, then they are instructed to find the issues for the plaintiff." (Italics ours.)

It is clear that this instruction required of the defendant a stronger degree of proof than the law demands. Instructions containing the same vice as the present one have been so frequently condemned that it is unnecessary to refer to the authorities bearing upon the question.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

233 - 31844

WILLIAM MILLER, Appellee, v. MILO B. FRENCH, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The appellee, William Miller (hereinafter called the plaintiff), a physician and surgeon, sued the appellant, Milo B. French (hereinafter called the defendant), in the Municipal Court of Chicago, for $400 for professional services that the plaintiff rendered to members of the family of the defendant. The plaintiff, in the statement of claim, made a total charge of $550 for services and credited the defendant with a payment of $150 on account. The sole defense interposed by the defendant in his affidavit of merits was "that all of the services performed by the plaintiff for the defendant were not of a fair, reasonable value to exceed the sum of $150 and that defendant has paid to the plaintiff the sum of $150, and that the defendant is not indebted to the plaintiff in any sum whatsoever."

It would appear from the record in this case that this is the second trial of the cause. In the first the jury found for the plaintiff and assessed the damages at $400, and judgment was entered for that amount. Thereafter the defendant moved the court to vacate and set aside the judgment and that motion was granted and a new trial awarded. In the second trial the jury assessed the plaintiff's damages at $275. Judgment was entered on the verdict and this appeal followed. The plaintiff has not filed a brief in this court.

It will be noted that the defendant in his affidavit of merits practically conceded that the services rendered by the plaintiff to members of his family were worth $150. We have examined with care the record in this case and we are satisfied that the proof clearly shows that the plaintiff rendered important services to the members of the family of the defendant and that the amount awarded him by the jury is amply warranted by the evidence. In fact, we think that the proof would have justified a finding for the plaintiff in a larger amount, and in view of the character of the services rendered the defendant and the very moderate amount of the judgment, we are unable to see any just reason for the present appeal.

The defendant complains that the court erred in its rulings in respect to the admission of certain evidence, but in our view of the case it is entirely unnecessary to refer specifically to these rulings for the reason that the verdict is amply sustained by competent evidence and a verdict for a lesser amount would not be justified.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

254 - 31865

MAX BARKIN, (Plaintiff) Appellee, v. J. J. GUTSTAADT, (Defendant) Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Max Barkin, appellee, hereinafter called the plaintiff, filed a complaint in forcible detainer, in the Municipal Court of Chicago, against J. J. Gutstaadt, appellant, hereinafter called the defendant. On the trial a verdict was returned in favor of the plaintiff, judgment was entered, and this appeal followed.

The plaintiff claimed right of possession to the apartment in question - located on the second floor of the building known as 3905 West Adams Street, Chicago - under a written lease from Paula Fagan and Samuel Fagan to the plaintiff for a term beginning October 1, 1926, and ending September 30, 1927. The defendant claimed the right of possession of the apartment under a written lease from Abraham Rootberg; this lease is dated March 22, 1926, and is for a term beginning April 1, 1926, and ending March 31, 1927.

It appears that Abraham Rootberg was at one time the owner of the building in which the apartment is located. In 1923 Samuel Fagan et al. filed a chancery suit in the Circuit Court of Cook County against Rootberg et al.; the object of the bill, one for specific performance, was to compel Rootberg and others to convey to the complainants the premises in which the

apartment is located. The complainants were the same persons who leased the apartment to the plaintiff, Max Barkin, and the said Rootberg is the person who made the lease to the defendant, J. J. Gutstadt. On July 2, 1926, a decree was entered finding the equities with the complainants and directing Rootberg and others to convey the real estate in question to Samuel Fagan and Paula Fagan, said conveyance to be dated as of May 1, 1923, and Rootberg and his wife, in obedience to the decree, conveyed the premises to Samuel Fagan and Paula Fagan by their warranty deed dated May 1, 1923.

The defendant first contends that it was error to admit in evidence the record in the case of Fagan v. Rootberg. The defendant claimed the right of possession of the apartment under a lease from Rootberg dated March 22, 1926, and as this lease was made at a time when the chancery suit was pending the defendant accepted the lease subject to the rights of the parties to the chancery proceedings, as the same might be finally determined in that litigation. (Davidson v. Dingelding, 295 Ill. 367, 371-372; Yates v. Smith, 11 Ill. App. 459, 460; Brachtendorf v. Kohm et al., 72 Ill. App. 228, 231.) Many other authorities to the same effect might be cited but the rule stated is so firmly established that further references are unnecessary. The record in the chancery case was competent evidence bearing upon a very material question in the case.

The defendant next contends that in any event he was holding over under a void lease and that he became a tenant from month to month and as such was entitled to sixty days notice under Sec. 6, Chap. 80, Ill. Rev. Statutes; that there never was any written notice served on him before the commencement of the

present proceedings, and the verdict and judgment should therefore have been in his favor.

Section 12 of the same chapter reads as follows: "When the tenancy is for a certain period, and the term expires by the terms of the lease, the tenant is then bound to surrender possession, and no notice to quit or demand of possession is necessary." In Schreiber et al. v. C. & E. R. R. Co., 116 Ill. 349, 348, the court holds that where premises are occupied under a lease for a fixed time a tenant is bound to surrender possession at the end of the term without any notice to quit or demand of possession. To the same effect is C. & St. L. R. R. Co. v. Higgins Ferry Co., 82 Ill. 230, 233. The plaintiff introduced proof that after the entry of the decree in the Circuit Court the Fagans entered into an oral lease with the defendant for the months of July, August and September, 1926; that the defendant agreed to surrender possession of the apartment on September 30, 1926, and that he paid rent to the Fagans for the premises for the said three months under the oral lease. The defendant testified that he did not make a new lease with the Fagans and that he did not agree to vacate the premises on September 30, 1926, and that the Fagans, after the decree, accepted from him the same monthly rental as he had theretofore been paying to Rostberg, and he contends that by their conduct the Fagans admitted the validity of the defendant's lease and accepted the defendant as a tenant in possession. We have carefully examined the evidence in respect to this branch of the case and we are satisfied that the jury were justified in finding that after the decree the defendant entered into an oral lease with the Fagans for the term of three months and that he agreed to surrender possession of the premises on September 30, 1926. That lease being for a definite

period, the defendant's contention that he was entitled to notice before the commencement of the suit, is without merit.

The plaintiff, Barkin, was entitled to the possession of the premises October 1, 1926, and the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

90 - 31218

DENNIS J. EGAN, Bailiff of the Municipal Court of Chicago, Plaintiff in Error, v. FRED F. LUDKE and JACOB RISSMAN, Defendants in Error.	ERROR TO COUNTY COURT, COOK COUNTY.

Opinion filed Jan. 18, 1928.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is a writ of error by Dennis G. Egan, Bailiff of the Municipal Court, plaintiff, to review an order of the County Court of Cook County, which was entered March 26, 1925 - in favor of Fred F. Ludke and Jacob L. Rissman, defendants - vacating and setting aside an orderentered July 22, 1924, which latter order was entered on the ground that the judgment in the original case had not been paid or satisfied, and which ordered a satisfaction piece which had been filed on June 13, 1924, stricken from the files, and the record of the satisfaction of said judgment set aside and vacated.

On September 3, 1919, Fred F. Ludke began a replevin suit in the Municipal Court against Chas. Muehlhausen for a one-ton motor truck. In that cause, on September 3, 1919, a replevin bond was executed by Fred F. Ludke and Jacob L. Rissman, to Egan, bailiff, in the penal sum of $800.00. On October 15, 1919, judgment was entered in the replevin suit in favor of the defendant, therein, and a writ of <u>retorno habendo</u> ordered issued for the return of the property.

Opinion filed Jan. 12, 1926.

Subsequently, suit was brought by Egan, Bailiff, for the use of Chas. Muehlhausen, on the replevin bond, against Ludke, principal, and Kissman, surety, and on March 4, 1921, a judgment recovered in the sum of $600.00.

On May 24, 1924, an entry in the records of the court to the effect that the judgment was satisfied, was ordered expunged and a certain satisfaction piece was ordered stricken from the files.

On July 12, 1924, the attorneys for the defendants, representing to the Chief Deputy Bailiff of the Municipal Court that the judgment had been paid and satisfied, persuaded him to execute the satisfaction piece theretofore signed by Muehlhausen, and on July 22, 1924, the court, after a hearing, found the judgment had not been paid or satisfied, and ordered that the satisfaction piece filed on June 12, 1924, be stricken from the files, and that the record of the satisfaction of the judgment be set aside and vacated.

Although that was a final and appealable order, yet the court, subsequently, in March, 1925, entertained a motion to set aside and vacate the order of July 22, 1924, and, after an elaborate hearing, in the course of which much testimony was taken and many exhibits introduced in evidence, on March 26, 1925, entered an order setting aside and vacating the order of July 22, 1924.

The record shows that the plaintiff preserved his rights by objecting, before the taking of any evidence, to the action of the court; and by making a motion, after the hearing of the defendant's evidence, to deny the relief sought, and

by making a similar motion at the close of all the evidence.

We have not been furnished with a brief by the defendants.

In our judgment, there are two specific reasons why the judgment of the trial judge must be considered to be erroneous. In the first place, the record shows that the order of July 22, 1934 was a final and appealable order; and, in the second place, the defendants were guilty of laches in permitting approximately eight terms of court to intervene before making their motion and showing no sufficient reason for such extended delay.

The bill of exceptions, which constitutes part of the record of the case in this court, and covers one hundred pages, practically all of the testimony of all the witnesses, is not in typewritten or conventional print, but is in the form of photostatic copies of typewritten pages. The hundred pages of photostatic copies have a dark, almost black, background, and the letters purport to be white, although they are generally indistinct, and incapable of being read without considerable difficulty. Photostatic copies of typewritten pages of testimony are not satisfactory; they entail much unnecessary labor on the part of the court, and should not be used in making up a record for this court. Brunicka v. Prudential Ins. Co., 235 Ill. App. 257, 263.

Being of the opinion that the trial judge erred in entering the order of March 26, 1935, the order will be reversed and the cause remanded with directions to the County Court that it be expunged.

REVERSED AND REMANDED WITH DIRECTIONS.

HOLDOM AND WILSON, JJ. CONCUR.

by making a finality motion on the issue of all the evidence.

We are not been furnished with a copy of the affidavit.

In our judgment, there are two equitable reasons why the judgment of the trial judge must be sustained in our opinion. In the first place, the record shows that the notice of July 20, 1967 was a final and unqualified demand and, in the second place, the information was merely of issues in pending supersedeas which were of doubt to interpose before making their motion for summary judgment affidavits for such extended delay.

The bill of exceptions, which constitutes part of the record of the case in this court, has merits the trial judge, practically all of the testimony of its the witnesses, is not in dispute of or essential fact, but is in the form of deposition copies of depositions taken, the testimony taken of questions propose have a work, almost issue, both ground, and the issues remain to be tried, although that are punctually indicate, the possible of being tried without unnecessary difficulty. Deposition copies of items written taken of examining the are satisfactory; they could most conveniently lines on the part of all parties, and should not be used in making or ruling for this court. Dorsey v. Commercial Ins. Co., 274 Ala. 1, 145 So. 2d.

Review of the record in this cause, we find that trial court in entering the order of March 16, 1968, the order will be reversed and the cause remanded. All directions of the trial court that it be expunged.

REVERSED AND REMANDED WITH DIRECTIONS.

All concur.

JOHN A. MORRIS, Appellee, v. TUTHILL BUILDING MATERIAL COMPANY, a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Jan. 18, 1928.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal by the defendant, Tuthill Building Material Company, a corporation, from a judgment in the Municipal Court, in favor of the plaintiff, John A. Morris, in the sum of $655.75, for damages to the plaintiff's automobile.

Although in the brief forthe defendant, it is stated that the only points relied upon for a reversal of the judgment are the failure of the trial judge to give a peremptory instruction to the jury to find the issues for the defendant, and the admission of improper testimony, the only point argued is whether the trial judge erred in admitting improper testimony. We shall, therefore, consider that point only.

The evidence shows, substantially, the following: That on October 2, 1924, the plaintiff, in company with his wife, was driving a Buick automobile north on Halsted street, a north and south street, behind a large six-wheel truck, loaded with brick; that the plaintiff blew his horn and

started to go around on the left side of the truck; that the truck at that time began going towards the left, and, so, as the plaintiff drove, crowded him finally into the ditch on the left side of the concrete road; that when the plaintiff and his automobile got even with where the driver of the truck was sitting, the driver of the truck had both arms over the wheel, as though he were asleep; that there was no traffic coming in the opposite direction; that all the time that he, the plaintiff, was driving past the truck he blew his horn; that at the point in question, Halsted street was wide enough for automobiles to pass each other going north and south; that when his automobile finally stopped, it was in the ditch, on the left side of the road, and damaged.

No evidence was introduced on behalf of the defendant.

The plaintiff introduced evidence showing that the repairs of the automobile cost $505.75, and that he had paid $100.00 for necessary automobile hire during the period within which his automobile was being repaired.

Plaintiff also offered evidence to show that the truck in question belonged to the defendant. On September 29, 1926, the plaintiff served a written notice on the defendant to produce at the trial, "all bills of sale, chattel mortgages, certificates of Secretary of State concerning state license, contracts, leases, and any and all records which the defendant may possess which may tend to show that the defendant corporation owned, operated or allowed to be

operated, the automobile truck which was involved in an accident with the automobile of the plaintiff, on or about the second day of October, 1934. The notice further recited that in the event of the failure of the defendant to produce such papers, he would offer in evidence secondary proof of ownership, operation or permission to operate the automobile truck, by or on behalf of defendant. At the trial, in response to that notice, the defendant produced nothing. The plaintiff, on the subject of ownership by the defendant, offered in evidence Certificate No. 28401 of the Secretary of State, the application for the registration of a motor truck by the "Tuthill Building Material Company." The certificate of the Secretary of State recites that the endorsement on the application shows that truck license No. 46718 was assigned to the Tuthill Building Material Company. Its admission was objected to on behalf of the defendant, but the trial judge overruled the objection, and permitted its admission. That, we think, was a correct ruling. The defendant had been fairly notified in writing to produce that very certificate of the Secretary of State, as well as any other papers and records, and had seen fit not only not to produce any papers, but not to offer any evidence whatever. Suburban B. T. Co. v. Malkvill, Adm., 185 Ill. 535, 538; Warsaw, Wolfson, Cohen & Co. v. Schwarzschild & Sulzberger Co., 194 Ill. App. 619.

The plaintiff testified that his wife, who was with him at the time of the collision, took down the license number; that he could do nothing but read the first three figures, which

were 467. The record shows that the plaintiff was shown a paper marked, "Plaintiff's exhibit 6," and was asked to refresh his recollection in reference to the license number of the truck. He then answered that it was the same number as the other, meaning, apparently, the same number as the one on the truck, which was 46718. The exhibits are not enumerated in the index of the abstract, and we have not been able to find the document referred to in the record. However, the testimony of the plaintiff is there, and we think, having in mind the notice served upon the defendant, that his evidence and the certificate were not only competent, but sufficient. Counsel urges further that there is a slight difference in the name of the defendant and the name in the certificate of the Secretary of State. That difference, however, we think is insubstantial.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

HOLDOM AND WILSON, JJ. CONCUR.

261 - 31872

BROADVIEW BUILDING CORPORATION, Appellee,	APPEAL FROM
v.	MUNICIPAL COURT
	OF CHICAGO.
MORRIS EHRLICH, Appellant.	

Opinion filed Jan. 18, 1928.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal from an order overruling a motion of the defendant, Ehrlich, to vacate a judgment by confession upon a lease. The petition of the defendant upon which the motion to vacate was based is substantially as follows:

that the plaintiff obtained judgment by confession on the lease for $300.00 for the December rent;

that on July 29, 1926, he, the defendant, entered into a written lease with the plaintiff by which

> "the plaintiff leased and demised to the defendant the dining room located at the south end of the Broadview hotel, 5540 Hyde Park Boulevard, Chicago, Illinois, and the appurtenances, to be used for a restaurant to be conducted in said hotel; and said defendant did then and there take possession thereof; that prior to the making of said lease, the said premises had been used for restaurant purposes, equipped with telephone service to the rooms of the guests of the hotel; the use of lavatory facilities in said hotel, and the use of a room on the main floor of said hotel commonly used for banquet purposes; that at the time of the making of the lease herein, it was then and there intended and agreed by and between the parties hereto that the said telephone service, lavatory facilities, and the said room for banquet purposes was and constituted a part of the demised premises and appurtenances, that at the time of the making of said lease, the said

lessor did then and there deliver to the lessee the keys for the said room then and there used for banquet purposes and the lessee did thereafter enjoy the use of the telephone service with the guests of said hotel, together with the useof lavatory facilities for himself, employees and guests, and did continue to use the said banquet room as contemplated in said lease."

The petition stated further, that on September 1, 1926, the lessor caused the telephone service, as above mentioned, to be removed, and, on November 15, 1926, caused the door of the lavatory to be equipped with a lock or coin device, and, on December 3, 1926, caused the locks on the doors of the banquet room to be changed, thus depriving the lessee of access thereto; that he has been deprived of the foregoing appurtenances since the particular times mentioned above, and without his consent; that from time to time he requested of the lessor that he, the defendant, be given use of the above mentioned appurtenances, but the lessor failed to acquiesce; that the acts of the lessor constitute, in law, an actual eviction; that the deprivation of the use and enjoyment of the premises demised, has greatly injured him, the defendant, and caused him considerable damage; that by reason of the facts set forth, he is not liable to the lessor for any rent under and by virtue of the terms of the lease sued upon.

On January 7, 1927, the motion of the defendant to vacate was denied. This appeal is from that order.

In our opinion, the judgment of the trial judge was correct. As urged in the argument of counsel for the plaintiff, if the contentions of the defendant were sound, it would permit him to retain the full possession of all the

premises defined in the lease without any payment of rent.

Further, as to the particular matters of fact of which complaint is made by the defendant, we do not think that any, or all of them together, constitute a defense of plaintiff's claim for rent. It will be observed that the representations concerning the removal of the telephone pertained to matters that transpired over three months before the judgment was entered, and that the defendant had not seen fit to move out, but still retained possession of the premises, and paid the rent for the months of October and November. As to the representations that on November 15, 1936, the plaintiff caused the door of the lavatory to be equipped with a lock or coin device; that change may have been an improvement and for mutually advantageous purposes. As to the representations concerning the use of the room on the main floor of the hotel commonly used for banquet purposes, and concerning which the defendant says in his petition that on December 3, 1936, the plaintiff caused the locks on the doors to be changed, thus depriving the lessee of access thereto; we do not think they are material. The claim of the defendant that the room in question was an appurtenance of the premises which were demised is not shown by the facts set up. Hughs v. Par Kar Amusement Co., 236 Ill. App. 487; Gluett v. Shepperd, 141 Ill. 636.

Considering the terms of the lease, the nature of the premises and the uses contemplated, and that the defendant remained in possession, in our judgment the charges made by the defendant in his petition did not justify the setting aside

or the vacating of the order of January 7, 1927.

The order and judgment of the trial court are affirmed.

AFFIRMED.

HOLDOM AND WILSON, JJ. CONCUR.

298 - 31909

ARTHUR DAVIS, for use of J. C. HUNT, doing business as CHICAGO PHONOGRAPH MANUFACTURING CO., Appellees,	
v.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
WHITE WAY WET WASH LAUNDRY, INC., a corporation, Appellant.	

Opinion filed Jan. 18, 1928.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Arthur Davis, for use of J. C. Hunt, doing business as Chicago Phonograph Mfg. Co., brought suit in the Municipal Court against the defendant, White Way Wet Wash Laundry, a corporation, and on August 31, 1926, obtained a judgment in the sum of $160.95.

On September 28, 1926, the defendant moved the court to vacate the judgment, and filed an affidavit in support of its motion. The affidavit, made by one Gerstein, President of the defendant company, set up substantially the following;

> "that on the 28th day of August, 1926, he was served with a statement of claim and summons in the above entitled matter; that he immediately took the matter up with Arthur Davis, the nominal plaintiff hereinabove mentioned, who said he would take care of the matter because of the fact that it involved a certain alleged purchase that he made of J.C. Hunt, the beneficial plaintiff herein, and promised that he would straighten out the matter with Mr. Hunt;
>
> "that in reliance of said promise on the part of the said Arthur Davis, that he would straighten out the matter with the said J. C. Hunt, he delivered the

Opinion filed Jan. 10, 1972.

Statement of Claim and the summons to the said Arthur Davis, and that he made inquiry of the said Arthur Davis the following day if the matter has been attended to and that said Arthur Davis had informed this affiant that he had settled his controversy with the said J. O. Hunt, and that it was not necessary for the defendant to bother or worry about the case any further; that in reliance of such representations made by the said Arthur Davis, the said defendant did not pay any further attention to the said case, figuring at the time that the suit would be dismissed on the motion of the plaintiff on the return day thereof;

"that on September 25, 1926, the said defendant made an application for a loan from the Stock Yards National Bank and that one of the officers of said bank informed this affiant that there was a judgment entered against the defendant in the sum of $160.95, by default; that this affiant immediately conferred with William Feldman, attorney for the defendant, and informed him of the facts pertaining to said cause;

"that at no time did the defendant ever receive a notice of the assignment of wages, if any, as alleged in the plaintiff's Statement of Claim, and in particular that this defendant did not on or about May 25th, 1926, receive the ordinary and customary notice of assignment and did not receive any paper, writing, document, notice of assignment from the said J. O. Hunt, whatsoever;

"that the said defendant did not have in his employ the said Arthur Davis on June 11, 1925, but states the fact to be that the said Arthur Davis first was employed by the said defendant on or about April 1, 1926;

"that the said defendant is not indebted to the said plaintiff in the sum of $160.95, or any part thereof."

It is contended for the defendant that the statement of claim was insufficient. We have held that in a 4th class case such as this, it is only necessary to state enough facts to inform the defendant of the nature of the plaintiff's cause of action, such facts as will enlighten him to such an extent that he may know enough to realize what actually is the gravamen of the claim which is made.

This court said in McClunn v. Gillespie, 227 Ill. App. 400,

> "So, it will be seen, that the history of this subject shows the Supreme Court has considered, with great care, the important question of pleading in fourth-class cases in the municipal court, and, from an early inclination, as shown in the Gillman case, supra, towards the rigorous requirements of common-law pleading, that the statement of claim should state a cause of action, has reached the conclusion that all that should be required in such cases is a statement of sufficient facts reasonably to inform the defendant of the claim against him, and that it is not necessary to state sufficient facts to make out a cause of action."

Bearing the foregoing in mind, it is quite obvious that the statement of claim, here, contained ample facts to inform the defendant quite fully as to the nature of the plaintiff's cause of action.

The suit was not brought in the name of the assignee, and so does not fall within Section 18 of the Practice Act. Surface v. Chicago, Milwaukee & St. Paul Ry. Co., et al, 191 Ill. App. 261.

It is contended further that the petition stated sufficient reasons for setting aside or vacating the judgment. Counsel for the defendant, however, admit "that they did not use ordinary diligence, because if they had they would not have entrusted the papers unto the assignor, and would have delivered the statement of claim and the summons to their attorney." That is a very frank and commendable statement, but it demonstrates that the facts alleged, to justify the granting of its motion were insufficient.

In our judgment, therefore, the ruling of the trial judge was correct. The judgment will be affirmed.

HOLDOM AND WILSON, JJ. CONCUR. AFFIRMED.

38 - 31863

HARPER F. CARROLL, Appellant, v. ALEXANDER BISNO, ET AL, Appellees.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

Opinion filed Jan. 18, 1928.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On January 25, 1927, the complainant, Harper F. Carroll, filed a bill of complaint in the Circuit Court against the defendant Alexander Bisno, and others, seeking, among other things, to establish a trust in certain personal property.

On March 12, 1927, the defendants, Alexander Bisno and Winifred Salzman, filed a joint and several demurrer to the bill of complaint, setting up, among other things, that the bill of complaint did not state a cause of action. The complainant filed a replication; and, on April 21, 1927, the Chancellor entered an order sustaining the demurrer to the bill of complaint, and dismissing the bill at the complainant's costs. This appeal is therefrom.

It is alleged in the bill of complaint, that on October 24, 1926, the defendant Bisno, represented to the complainant that he owned certain real estate known as 5806 and 5808 Indiana avenue, the title to which was held for him in the name of the defendant Salzman; that

if the complainant would bring about a sale or exchange of that real estate, the defendant would pay him $1050; that the complainant procured a trade of said real estate for said defendant Bisno for certain other real estate known as 67 East 36th street, in accordance with which Bisno had the real estate last mentioned conveyed to the defendant Salzman in secret trust for him by William Ramsey and his wife, by warranty deed dated December 6, 1926, in exchange for 5806 and 5808 Indiana Avenue; that the contract, in pursuance of which the exchange was made, was entered into by Bisno and Ramsey and wife on October 20, 1926, and bore date October 16, 1926.

It is further alleged that after entering into that contract, the defendant Bisno dictated to his stenographer, and caused to be drawn up a certain writing which he induced the complainant to execute, and deliver to him, Bisno; that that contract dated October 24, 1926, and addressed to Bisno, is as follows:

> "In connection with the trade deal between you, Alex Bisno and Wm. H. Ramsey and Ruby Ramsey, whereby you are trading the six-flat building located at 5806-5808 Indiana avenue, for the two-flat building located at 67 E. 36th street. I agree to accept a commission of $1050 in the following described manner, only if and when the deal is consummated.
>
> I must sell the building within sixty days from date hereof, at a price of not less than $15,000, with $1500 down, the balance on a contract all due in three years, with prepayments of $65 per month and interest at 7 per cent, the balance of the contract all due in three years.
>
> It is understood that this price of $15,000 is net to you, and anything I get over and above $15,000, goes to me. It is understood that you are to get $15,000 for the property, with $1500 in cash, net to you if and when I sell the building. In the event however, that I fail to sell the building, I am to take my commission of $1050 in the form of a third mortgage on the two-flat building at 36th street subject to a first and second mortgage not exceeding $11,000, it being

understood that my third mortgage runs straight without prepayments, but bears interest monthly. It is understood that the commission of $480 if and when collected by Lee Price from Wm. R. Ramsey and Ruby Ramsey, is to be turned over in full, to me."

It is further alleged that afterwards, in accordance with the above mentioned document, he, the complainant, brought about a sale of 67 E. 36th street on behalf of Bisno, whereby, on November 6, 1926, Bisno entered into a contract, dated November 4, 1926, with one Johnson and wife for the sale of 67 East 36th street to them, which had been fully performed, and by which Bisno thereafter caused Salzman to convey to Johnson and wife, by warranty deed dated December 11, 1926, the property known as 67 East 36th street, and as the result of which, Bisno received in consideration therefor, $1,000 in money, and as a part of that transaction, Johnson and his wife assumed an incumbrance of $4,000, which was secured by a trust deed then on 67 East 36th street; that, also, Johnson and his wife conveyed to Salzman a certain other piece of real estate known as 584 Browning avenue, for a consideration of $6,000 over and above incumbrances thereon; that Bisno, also, received as an additional consideration $100.00, due in adjustment of rents, and the further sum of $5400 in promissory notes executed by Johnson and wife, payable to bearer, dated December 11, 1926, which notes were made up of thirty-five $100.00 notes, and one note for $1900, payable on or before three years after its date, and secured by trust deed dated December 11, 1926, of Johnson and wife.

It is further alleged that the defendant Bisno, ought to pay the complainant $1030, so earned by him on

the exchange of 5806 and 5808 Indiana avenue for 87 East 36th street.

It is further alleged that the defendant Bisno, in justice and equity, holds in trust for the complainant and undivided interest of $1500, in the above mentioned promissory note of $1900, and that the $1500 and interest thereon should be paid over to the complainant as and when the principal and interest of the $1900 note is paid up.

It is further alleged that the defendant Bisno has paid to the complainant only $450 of the $1050, and that there remains due to the complainant $600 thereof; that the defendant Bisno has refused to recognize that the complainant has any right or interest in the $1900 note, and has threatened to sell or dispose of it, and convert it to his own use.

The complainant prays for an injunction and an accounting; that the $1900 note be charged with a trust in his favor to the extent of $1500; that the defendant may be decreed to pay to the complainant the above mentioned $600; that if the defendant Bisno has disposed of the $1900 note, he may be required to pay to the complainant $1500 and interest thereon.

We are of the opinion that the complainant has an adequate remedy at law. The document of October 24, 1926, addressed to the defendant Bisno, signed by the complainant and marked approved by the defendant, though inartistically drawn and somewhat difficult to understand, nevertheless,

shows, upon analysis, that the defendant merely became, in case the property was sold or exchanged, the debtor of the complainant. The document provides, "I agree to accept a commission of $1050 in the following described manner, only if and when the deal is consummated." According to that, when the deal was consummated, if there was nothing further in the document, the defendant Bisno became the debtor to the complainant to the extent of $1050. As to the rest of the document, it does not, in our judgment, in any way, make the defendant Bisno a trustee of anything he might have received, considering the facts alleged in the bill of complaint as to the way in which the transaction was ultimately closed. There may be $450 due the complainant on account of the particular amount of $1050 agreed upon as a commission; but there is nothing in the document pertaining to the $1800 note, save in so far as it contains the words, "anything I get over and above $15,000 goes to me." Of course, all that is involved in the relations of the two parties growing out of the document in question and the exchange of the properties, could be shown in a suit at law. The document itself provides for an indebtedness, if any, and does not establish a trust. The contract provides for a commission of $1050, and whatever the defendant may "get over and above $15,000," although the latter is dependent upon whether the services of the complainant produce anything over that sum.

It is urged for the complainant that the defendant Bisno ought to pay him $1050, on the exchange of the properties, and ought to hold in trust for the complainant an un-

divided interest of $1500 in said promissory note of $1900; the said $1500 and interest thereon to be paid over to the complainant as and when the principal and interest of said $1900 note was paid up. However, there is nothing in the contract on that subject, and the complainant's rights, whatever they are, are based on the contract itself. It is true, that the deal may have been closed as between defendant Bisno and Johnson and his wife, in a way which made the terms of the contract not directly applicable, but that does not prevent the complainant from having an adequate remedy at law. If in a suit at law the complainant proves the contract and what the parties did, the court would then be able to determine the mutual rights and obligations of the parties. The complainant could sue in assumpsit, and when he proved the contract and that he had carried out his obligation, he would then be entitled to prove the amount of his damages. The damages might be difficult of appraisement, but that would not justify suing in equity. It is true that equity takes jurisdiction of some cases of complicated accounts, where assumpsit would normally lie, but that is generally because the items of account are numerous and complicated, and not suitable for the determination of a jury. No such situation exists here. As we have stated above, in our judgment, there was an adequate remedy at law.

The decree, therefore, will be affirmed.

AFFIRMED.

HOLDOM AND WILSON, JJ. CONCUR.

74-33017

247 I.A. 625

A. O. CHAPIN,

PLAINTIFF IN ERROR,

vs.

E. H. SHEPPLEY and C. E. SHEPPLEY, doing business as SHEPPLEY BROTHERS,

Defendants in Error.

WRIT OF ERROR TO SUPERIOR COURT, COOK COUNTY.

Opinion filed Jan. 18, 1928.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This case comes here upon a writ of error prosecuted by the plaintiff, A. O. Chapin to reverse a judgment entered in favor of the defendants upon an instructed verdict.

The action was in assumpsit to recover damages in the sum of $5,000.00.

The issue was precipitated by a declaration and a plea of the general issue.

The declaration alleged that E. H. and C. E. Sheppley, doing business under the name of Sheppley Brothers, the defendants, undertook to act as agents for the plaintiff in the sale or exchange of a rooming house located in Chicago, operated and owned by the plaintiff; that while acting as such agent for the plaintiff, and after an agreement of exchange had been practically made for a house located in Piqua, Ohio, and while the details of the exchange were entrusted to the defendants, the deed, purporting to convey the title to the property in Piqua to the plaintiff, which was entrusted to the defendants, through the

negligence of the defendants, was not recorded in the County of Miami, Ohio, in which the town of Piqua is situated; that through the connivance of the subagents of the defendants, the grantors and former owners of the Piqua property, were induced to execute a second deed, in favor of a third party, and, thereupon, mortgaged it to innocent holders; and that as a result, the plaintiff was damaged.

At the close of the evidence, the court instructed the jury to find the issues for the defendant. That, we think, was error. At the close of the trial, the court said, "There is no use of going any further with this. No agency has been established as to the defendants, nothing has been shown here which would bind the Cheppley's." The record shows, however, that there was evidence introduced which tended to prove the responsibility, and therefore, the liability of the defendants, Cheppley Brothers.

The evidence of Sarah A. McCauley, who answered what she called a "blind ad," in that she received a letter which contained Cheppley Brothers letterhead. She testified that she went to the Cheppley Brothers office and was introduced to E. H. Cheppley; that when she showed her letter to the girl in the Cheppley offices, in the outer office, where they have an information bureau, she, the witness, was directed to Mr. Mackey's office. She further testified that Mr. Mackey introduced her to E. H. Cheppley and said, "this is the lady that wants to buy the proposition of Mr. Chapin," and Mr. Cheppley said it was a good buy.

Her testimony further was to the effect that at the time she signed the deed, she asked Mr. Mackey why it was made out to Douglas Dunn, and Mr. Mackey said, that is the way they make them when they take them over to be held in Theppley's office. She further testified that she met Theppley the first time she entered the office, and talked with him, and that she met him again upon the closing of the deal.

The evidence of E. H. Theppley himself shows that Mackey was a salesman for the defendants until late in May, 1924, and that after June 10, 1924, he gave Mackey the privilege of staying there in the office until he paid up certain money that he, Theppley, had advanced for him; that Mackey occupied an office with the defendants until October in 1925, the exact date of which he did not remember.

We do not desire to express any definite opinion as to just what, on the whole, the evidence actually shows; that is, whether it shows sufficient to make out a cause of action; but we are convinced there is ample evidence tending to prove the responsibility of the defendants for what transpired to the detriment of the plaintiff, to justify its submission to the jury. As the court said in Libby, McNeill & Libby v. Cook, 222 Ill. 206, 213, "To hold otherwise is to deny to plaintiff the right of trial by jury."

For the reasons stated, the judgment will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

HOLDOM AND SULLIVAN, JJ. CONCUR.

83-32021

247 I.A. 625

MAX L. RASOFF, APPELLANT, vs. YELLOW CAB COMPANY, a Corporation, APPELLEE.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Jan. 18, 1928.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On February 11, 1927, the plaintiff, Max L. Rasoff, brought suit in the Municipal Court against the Yellow Cab Company, a corporation, and Sam Harres, defendants, in the sum of $218.33, upon an alleged attorney's lien; and on April 20, 1927, the court, without a jury, found the issues against the plaintiff, and entered judgment that the plaintiff take nothing by his suit, and that the defendant have and recover his costs. This appeal is from that judgment.

The issue was precipitated by an amended statement of claim and an amended affidavit of merits. In the amended statement of claim, the plaintiff charged that he was a duly licensed attorney in the State of Illinois; that on December 11, 1926, he was retained by Sam Harres to represent him in his claim for personal injuries against the Yellow Cab Company; that the said Harres agreed to pay the plaintiff the sum of one-third of any amount realized by suit or settlement;

Opinion filed Jan. 18, 1960.

that on December 15, 1926, he, the plaintiff, personally served an attorney's lien, as prescribed by statute (a copy of which was attached to the statement of claim), on the defendant by leaving a copy of it with one Rose Dixton, the duly authorized agent of the Yellow Cab Company; that subsequent thereto, the defendant, without the presence of the plaintiff, settled the claim with Harres for $650.00, upon which, he, the plaintiff, had a lien to the extent of one-third, or $216.33.

The defendant set up in its amended affidavit of merits that the plaintiff did not serve the defendant, or any of its officers, or duly authorized agents, with a lien notice, in accordance with the Statute on Attorneys' Liens; that it is not indebted to the plaintiff in the sum of $216.33, or any other amount. It admits therein, however, that it compromised a right of action with one Sam Harres for $650.00, but that it is not liable to the plaintiff for such compromise, because the plaintiff did not comply with the Statute on Attorneys' Liens.

In the amended affidavit of merits, the defendant denied that Rose Dixton was a duly authorized agent of the defendant.

The evidence for the plaintiff, on the trial, was that he was an attorney, and was retained by his client, the plaintiff; that he, personally, served the notice of the attorney's lien in question; that he went to the office of the Yellow Cab Company; that he stated he wished to see some officer, and was there told that they

did not accept any liens, and that the Claim Department was on the third floor; that he walked up to the third floor, to an information desk, and found a Miss Rose Dixton working there; that he told her he had a lien to serve; that she took the notice and walked into the office, and then came back and said that she would take the notice and would sign for it; that he left the notice with her; that she then accepted, but would not sign for it. On cross-examination, he testified that he did not ascertain who the officers of the defendant were; that he went to the office marked, "John Hertz, President of the Board," of the defendant corporation; that he rapped at the door of the office, and a young lady came out, and he stated to her that he desired to see John Hertz; that he served the notice of attorney's lien on Rose Dixton; that he had spoken to her in that office when she was working for the defendant, before that day.

At the close of the evidence a colloquy took place between the court and counsel for the respective parties concerning the service of the lien. The following is part of what transpired;

"THE COURT: It is a question of law here.

MR. SAMUELS: Has the plaintiff rested, your Honor?

MR. KLAPMAN: Yes, we rest.

MR. SAMUELS: Then I make a motion in order to bring the matter to issue I make the usual motions to find for the defendant."

Then after a discussion between counsel as to

the law concerning the service of an attorney's lien, the following took place;

"THE COURT: We are not getting anywhere, the law in this state on the subject of attorney's lien provides however, such attorneys shall serve notice of lien upon the person against whom the suit is pending.

THE COURT: It also provides how service shall be made on corporations, a copy to be left with the president.

MR. KLAPMAN: Now, if the court please, the plaintiff takes a non-suit.

THE COURT: After the case has been heard on its merits you can't take a non-suit. Finding for defendant.

MR. KLAPMAN: Exception."

The only point urged for the reversal of the judgment is that the court erred in not allowing the plaintiff to take a non-suit. Under Section 50 of the Municipal Court Act, it is the law that a plaintiff is entitled to a non-suit at any time before the court "states its finding." Therefore, the question arises here, did the plaintiff's counsel move for a non-suit before the court stated its finding?

It was held in Mo. Pac. R. R. Co. v. Eastern Express Despatch Co., 230 Ill. App. 428, that where the plaintiff moves for a non-suit, after the court has indicated it would find for the defendant because of an infirmity in plaintiff's proof, but before any ruling or finding for the defendant was actually made, the motion should be allowed.

In American Shipping Co. v. Henderson & Co., 216 Ill.App.

175, Mr. Justice Holdom said,

> "The judgment in this record is a Municipal Court judgment, and the Municipal Court Act therefore controls. By Section 30 of that Act (J. & A. Sec. 3342) a plaintiff may suffer a non-suit on a trial before the court at any time before the court 'states its findings.' By Section 70 of the Practice Act (J. & A. Section 8007) such a non-suit may be suffered at any time 'before the case is submitted for final decision.'
> "It will be observed that there is a sharp distinction between the provisions of these two sections. When the court took the case he had made no decision of the motion of defendant for a finding in his favor. What the court had theretofore said was not a finding, but only an indication of the state of his mind, and the further action of the court was suspended when the cause was continued to a future time for further action."

An examination of the record, as well as the abstract, fails to show that at the time counsel for the plaintiff moved for a non-suit the trial judge had stated any finding whatever. That being the case, the motion was made in apt time and should have been allowed.

For not permitting the plaintiff to take a non-suit the judgment is reversed and the cause remanded to the Municipal Court with directions to enter a judgment of non-suit.

REVERSED AND REMANDED WITH DIRECTIONS.

HOLDOM AND WILSON, JJ. CONCUR.

95 - 32035

H. FRED SCHLINGMANN, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
JOSEPH SCHERZER, Appellant.	

Opinion filed Jan. 18, 1928.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is a suit by the plaintiff, H. Fred Schlingmann, in the Municipal Court, for a balance alleged to be due for labor and material furnished in the construction of a building owned by the defendant, Joseph Scherzer.

There was a trial before the court, without a jury, and a judgment for the plaintiff in the sum of $800.00 and costs. This appeal is by the defendant from that judgment.

The plaintiff's statement of claim charges that there is due him the sum of $824.50 for work done and material furnished at the special instance and request of the defendant, in and about the construction work on a building of the defendant, covering a period from February 5, 1922 to and including May 2, 1923. Attached to the statement of claim is an itemized statement of many items of debit and credit, which shows debits of $2,757.08, and credits of $1,932.50, and a balance due the plaintiff of $824.58.

Opinion filed Jan. 18, 1988.

The defendant filed an affidavit of merits, in which he denied that the plaintiff furnished labor and material as specified in his statement of claim; and denied that the charges made were fair, reasonable and customary. The affidavit of merits stated that a full and complete settlement was made with the plaintiff on or about the early part of May, 1933, and that the defendant was not indebted to the plaintiff in any sum whatsoever. In the affidavit of merits it is further denied that an account stated was made, and denied that the plaintiff had frequently demanded the amounts enumerated in the statement of claim.

The bill of exceptions contained what is entitled an "Agreed Statement of Facts." Although, apparently, the testimony of witnesses was taken and certain exhibits were offered in evidence, there is nothing in the bill of exceptions relating to the evidence that was introduced other than what is contained in the so-called "Agreed Statement of Facts."

The first paragraph of the so-called "Agreed Statement of Facts," is as follows:

> "It is hereby stipulated and agreed by and between the parties hereto, through their respective attorneys, that the following are the facts in said cause as shown by the evidence offered, introduced and admitted in the trial of said cause in the Municipal Court."

In the second paragraph, it is stated that during the months of February, March, April and May, 1933, the plaintiff did work and labor, and furnished material for the defendant in the construction and repair of a certain building belonging to the defendant; that the plaintiff is a carpenter and

builder, and that the total amount of the work, labor and material furnished to the defendant was of the reasonable value of $2,757.08. Those facts are definitely stipulated and agreed upon by the parties. The Agreed Statement of Facts then contains the following:

> "The plaintiff's testimony at the trial was that out of said amount the sum of $1,932.50 only had been paid by the defendant, and that there is a balance now due him from the defendant in the sum of $824.48, for which sum the plaintiff asked judgment against the defendant."

The Agreed Statement of Facts contains, further, five paragraphs, the first of which is as follows:

> "The testimony and statement of the defendant at the trial of said cause was that he had paid the plaintiff all of said amount of $2,757.08 above stated, except the sum of $44.58, which the defendant conceded to plaintiff and the defendant offered to pay said sum to plaintiff. In support of his testimony the defendant offered in evidence certain documents in the form of receipts signed by the plaintiff and given to the defendant, and marked exhibits one to six, both inclusive, which said receipts are hereto attached, the same having been offered, introduced and admitted in evidence at the trial; and that the total amount represented by and included in said receipts is the sum of $2,712.50."

The second is as follows:

> "Defendant testified that at the time the various payments were made by him to the plaintiff the plaintiff gave to the defendant receipts in writing acknowledging said payments. No particular form was adopted and the plaintiff wrote out said various receipts on any business card or piece of paper which he then had at hand. Defendant testified that in this manner he had a large number of various receipts for payments he had made to the plaintiff, that the numerous receipts were getting cumberson and he feared that some might be lost, and therefore preferred to have the various receipts written up on one sheet of paper, and that on or about the 23rd day of April, 1923, while the plaintiff was at the home of the defendant the defendant surrendered to the plaintiff certain receipts which the defendant then had at hand and

asked the plaintiff to acknowledge receipt of said various amounts on one sheet of paper. This was done by the plaintiff on or about the 23d day of April, 1923."

The third is as follows:

"Defendant testified that the receipt dated March 6, 1923, (Defendant's Exhibit 2), had been mislaid at that particular time and was not surrendered with the other receipts, and was not included in the list of payments recorded on the paper dated and signed April 23, 1923, (Defendant's Exhibit 1). Defendant testified that during the week between April 23, 1923, and May 1, 1923, he made two payments to the plaintiff, one for $400 (Defendant's Exhibit 3), and one for $100 (Defendant's Exhibit 4), as indicated by the receipts so marked; that the $400 payment (Defendant's Exhibit 3) was made on or about the 26th day of April, 1923; that the $100 payment (Defendant's Exhibit 4) was made on April 28, 1923; that thereafter he made two payments, one on May 1, 1923 (Defendant's Exhibit 5), and one on May 4, 1923 (Defendant's Exhibit 6), as indicated by receipts so marked."

The fourth is as follows:

"Plaintiff testified that the receipt dated March 6, 1923 (Defendant's Exhibit 2), covered the same item as the one referred to in Defendant's Exhibit 1 under date of March 15, 1923, for $300; that the receipt for $400 (Defendant's Exhibit 3) covered the same item as the one referred to in Defendant's Exhibit 1 under date of February 5, 1923; that the receipt for $100 (Defendant's Exhibit 4) covered the same item as the one referred to in Defendant's Exhibit 1 under date of February 20, 1923. The plaintiff further testified that prior to April 23, 1923, the defendant requested of him a list of the payments which he had made, and plaintiff made out a list of payments in the form of a receipt as evidenced by Defendant's Exhibit 1."

And the fifth is as follows:

"Plaintiff further testified that the defendant took this receipt marked Defendant's Exhibit 1 and promised plaintiff that he would gather together the various receipts which were heretofore given on business cards, scraps of paper, etc., and give these receipt back to the plaintiff at

a later date. Plaintiff testified that the defendant never returned or gave back to him any receipts of any kind whatsoever, and, when requested so to do, said that he would return them when he could find them or would destroy them, and not to worry about them. Plaintiff further testified that the receipts, Defendant's Exhibits 3 and 4, were the receipts given for the very first payments made by defendant on the job, and that these amounts of $400, $100 and $300 were noted and contained in the general receipt given as evidenced by Defendant's Exhibit 1. Plaintiff further testified that the question of receipts has never been disputed until the institution of this suit."

It would seem, therefore, that although there was a contest between the parties as to the amount of money which had been paid to the plaintiff by the defendant, on account of the work done and material furnished, the so-called "Agreed Statement of Facts," outside of the first sentence of the second paragraph, constituted merely an agreement between the parties, in condensed form, as to what the plaintiff and the defendant testified to at the trial.

The contest in the case seems to have arisen concerning the effect to be given certain receipts of the plaintiff which were given to the defendant. The defendant in his brief states that he does not dispute the amount of the original bill, but contends that the full amount has been paid, with the exception of $44.58, which he tendered in court.

In his brief, the defendant further says that his testimony is of equal weight with that of the plaintiff, and that he, the defendant, has in addition thereto the corroboration of his six receipts, and that, therefore,

the plaintiff has failed to make out his case.

In view, however, of what the Agreed Statement of Facts contains, chiefly, as stated above, the recitation that the plaintiff testified to certain things, and that the defendant testified to others, we do not feel that we would be justified in overriding the judgment of the trial judge. There was a contest that, in the end, became chiefly a matter of credibility. Evidently, the trial judge believed the plaintiff's testimony, and, doing so properly, as a consequence, entered judgment in his favor.

We have looked over the evidence as it is condensed in the Agreed Statement of Facts, and although there may be some slight discrepancies and inconsistencies, we do not feel justified in holding that the judgment was against the manifest weight of the evidence.

The judgment, therefore, will be affirmed.

AFFIRMED.

HOLDOM AND WILSON, JJ. CONCUR.

392 - 31903

MORRIS BEAR, doing business as University Hand Laundry, Appellee, v. HENRY YOUNG, doing business as Continental Laundry & Supply Co., Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Jan. 12, 1938.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This is an undefended appeal.

The cause was tried before the court without a jury, and there was a finding and judgment in favor of the plaintiff for $150, and defendant prosecutes this appeal asking a reversal.

The plaintiff operated a hand laundry and the defendant a steam laundry. The plaintiff was in the habit of employing the defendant to do laundry work for him, such work to be returned to the defendant as "wet wash". On January 4, 1936, "the usual Chinaman driver" of defendant called for a bag of laundry valued by agreement at $150. This bundle of soiled clothing was taken to the steam laundry of defendant, who washed it and kept it in one lot intact. About 6:30 of the evening of the same day that bundle of laundry with 24 or 27 other bundles was loaded by defendant into a Ford one ton truck with cover on top and panel body, with two doors which were locked after the load was on the truck. The driver proceeded in his usual way on his route to deliver the bundles

to the several owners. A small boy rode with him. When the driver reached 27th street and Union avenue a Ford sedan drove up along side in which were three men, one stepped on the running board of the sedan and pointed a revolver at defendant's driver, and said "police officers" and charged him with running over a woman. It was snowing and the street was deserted. The driver raised his hands and was ordered off the truck and into the sedan. One of the men got on defendant's truck and drove it away. The sedan with the boy and defendant's driver in the back seat, and the two robbers in the front seat, one of whom faced him and displayed a revolver, was driven away, and stopped in an alley at 33nd street and Union avenue, where they let the boy and the driver out without taking any money from the driver, although he had $50 on his person. The robbers told the boy and the driver to run straight ahead and not to go back. The driver ran to Halsted street and reported by phone to the defendant laundry that the truck was held up; then he went to the nearest police station and gave a description of the men who held him up. This complaint was written into the records at the police station and the information transmitted to the detective bureau, who sent out a tellatype report to all police stations, and reported the fact that the Ford was stolen loaded with wet wash.

Police Sergeant O'Donnell saw the report at the station and while patrolling in a "Flivver" at about two o'clock in the morning of the next day saw the laundry truck in a desolate place about two miles from the place of the robbery. This was reported to the station and it

was found to be the truck which had been reported stolen. When found by Sergeant O'Donnell the doors were open, and the truck was empty, but otherwise in sound condition. The police returned the truck to the defendant.

Plaintiff Bear testified that defendant's laundry had been doing work for him for some time; that the biggest loss aside from the loss in suit, was four sheets; that the people from whom Bear bought the hand laundry had their work done by the defendant, whom they recommended to him as doing good work and handling it in good shape; that at times they had a shortage, but it was always made good.

The evidence of defendant was not disputed by any proof offered by the plaintiff. The evidence proffered by defendant to the effect that the robbery was the result of labor and association trouble, which involved threats of violence, bombings, etc., and that the plaintiff's membership in an outlaw group of hand laundries was the inciting cause for the theft of the laundry was on motion of plaintiff excluded.

It may be that the exclusion of such proffered evidence was without error, as not being sufficiently connected with the robbery of plaintiff's laundry from defendant's servant, but however this may be, the fact remains that plaintiff's laundry was taken away from the possession of defendant's servant by force and arms, and the servant was impotent to defeat the purpose of the robbery. Under the law proof that the goods were lost by the bailee raises a presumption of negligence occasioning such loss, but this presumption may be

rebutted. The burden of proving negligence of defendant rested upon plaintiff, and while he made out a prima facie case, he did not attempt to overcome the rebuttable proof that the goods were taken away from his servant without the servant's negligence or without any negligence upon his part in the hiring of an incompetent or negligent servant. In this state of the record we think that defendant was exculpated from liability, for as said in Roberts v. Minier, 240 Ill. App. 518:

> "In all cases of loss by fire and burglary in which there was no evidence or imputation of culpable omission of duty that might have been exercised by a reasonably prudent man to avoid the loss, the burden of proof rests with the plaintiff and the evidence must go to the extent of establishing the loss, and must go further, and, showing the manner of the loss, show that the defendant could by some reasonable means have prevented it.
>
> The principle governing the burden of proof in the latter class of cases, where the charge is that the loss was occasioned by burglary, by theft, by fire, by the falling of the warehouse in which the goods were stored, or by inevitable accident, is that the burden of proof is on the bailor to prove defendant's negligence. (6 Corpus Juris, p. 1150, and Notes 97 et seq.)" Rhodes v. Warsawsky, 242 ibid. 101.

In Nichols v. Union Stock Yards & Transit Co., 193 ibid. 105, the court laid down the rule, with its exceptions, in the following language:

> "The rule that a default by the bailee in delivering or accounting for the property bailed makes a prima facie case of negligence, and that it devolves upon him to show he has exercised the degree of care required by the nature of the bailment, proceeds upon the theory that the facts surrounding the care of the property by the bailee are peculiarly within his knowledge and power to prove. The enforcement of any other rule would impose great difficulties upon bailors. But it is also the rule that where the failure to deliver is explained by the fact appearing that the goods bailed have been stolen or destroyed by fire, and the bailee is no longer able to deliver them, the law will not presume negligence and the onus or burden of proving the same is upon the bailor."

To like effect is Clemenson v. Whitney, 238 Ill. App. 308 and Eyster v. Matheson, 243 ibid.63.

We are of the opinion that the proofs of defendant, as above recited, that the goods in question were taken from him by three robbers without his connivance or prior knowledge rebute the presumption of negligence of defendant arising from the proof of the delivery of the goods, and failure to return them.

As the trial was before the court, we will do what the trial judge should have done, reverse the judgment of the Municipal Court and enter a judgment here of nil capiat and for costs.

JUDGMENT REVERSED AND JUDGMENT HERE OF
NIL CAPIAT AND FOR COSTS.

TAYLOR, P.J. AND GILDER, J. CONCUR.

301 - 31912

EDWARD L. BOWES, JR., Appellee, v. WILLIAM R. JOHNSTON and HELEN M. JOHNSTON, Appellants.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

Opinion filed Jan. 18, 1928.

MR. JUSTICE HOLDOM delivered the opinion of the court.

The plaintiff, a real estate broker in Chicago, brought this action against the defendants, the Johnstons, to recover a real estate broker's commission for having been the procuring cause of the sale of certain real estate in Evanston, Illinois, to one George L. Chamberlain for cash and other property of the value of $115,000.

There was a trial before court and jury, resulting in a verdict in favor of the plaintiff in the sum of $3450, upon which the court entered judgment after overruling defendants' motions for a new trial and in arrest of judgment; and defendants bring the record here for review, asking a reversal.

While errors are assigned upon the giving and refusing of certain instructions, defendants fail to argue or point out any infirmity in such instructions. Therefore such assignment of error is waived. Wickes v. Belden, 288 Ill. 86; Western Tube Co. v. Pederson, 128 Ill. App. 627.

Opinion filed Jan. 18, 1892.

Defendants argue for reversal that the verdict is contrary to the weight of the evidence, and that the plaintiff did not produce a purchaser ready, willing and able to buy the property on the terms specified by defendants, and that the plaintiff did not exercise good faith towards defendants as such broker, and that plaintiff abandoned his effort to sell the property to Chamberlain, and that after such abandonment defendants discharged the plaintiff as their agent and renewed negotiations with Chamberlain and accomplished the sale without the assistance of the plaintiff.

These were all questions of fact for the determination of the jury, who were the judges of the weight of the evidence and the credibility to be given to the testimony of the witnesses of the respective parties. While it is true that the evidence is in very sharp conflict, pro and con, yet the jury had the right in weighing the evidence to give credit to such witnesses whose testimony it believed to be true, and to disregard the testimony of such witnesses which it did not believe to be true.

It is not disputed by the defendants that the plaintiff in the first instance offered the property to George L. Chamberlain, who subsequently purchased the same, nor that defendants got in touch with Chamberlain by reason of the efforts of the plaintiff and that in the first instance Chamberlain was the customer procured by plaintiff for the sale of the property, and that Chamberlain ultimately purchased the same for a consideration of $115,000.

The sale was a matter of negotiation, which was started by the plaintiff with Chamberlain. Defendants

listed the property at the price of $130,000, and were always willing to accept $125,000, and considered offers of $95,000 and $100,000. The last sum plaintiff procured Chamberlain to raise to $105,000, and then again to $110,000, if Johnston would take a certain flat building in Chicago in exchange. The efforts of plaintiff were continuous from the time defendant employed plaintiff to make the sale until the sale was actually made, during all of which time plaintiff submitted the property to others, and sent descriptions and photographs to prospective purchasers, and also advertised the property for sale at his own expense. Defendants claim that plaintiff abandoned the sale and told them "I am through" and that he "would drop the matter". These statements of defendants plaintiff denied.

On March 11th or 12th, 1925, plaintiff said to William R. Johnston, "I understand you are expecting to close with Chamberlain, and if you do you will have to pay us a commission," to which Johnston replied, "I won't pay you a damn cent". In a letter in evidence defendants wrote "we propose to withdraw our home" and "go ahead and sell it ourselves because we feel the amount of money we would have to pay a real estate man in the way of commission would be better spent in advertising"; and in that letter wrote "we have gone along now six months without any results and will handle the matter ourselves." This is the letter which the defendants claim discharged plaintiff as defendants' agent in the matter of the sale of the Evanston property. It is likewise in evidence that after defendants claimed to have discharged the plaintiff from further action, William R. Johnston on February 12, 1925, wrote to plaintiff in which he said among

other things, "I personally believe that if the proposition was properly submitted to Mr. Chamberlain, by that I mean if all of the details were brought out to him, so he could see the difference for himself, beyond any question of doubt that he would see the matter in an entirely different light." On February 17, 1925, plaintiff wrote a letter to Mr. Johnston in which he wrote inter alia, "I saw Mr. Chamberlain today - there is no question but what he is interested." With this evidence before them the jury were instructed that if the plaintiff abandoned the sale or was lacking in good faith, they should find for the defendants.

The jury might readily believe from all the evidence that plaintiff produced a buyer ready, able and willing to buy, and who in fact did purchase the property on defendants' terms, and they might also find that plaintiff acted in good faith and that he was not discharged by defendants from his agency, and that he did not abandon his attempt to sell the property, and continued his efforts until, through them, defendants ultimately sold the property to Chamberlain. On these questions we are not permitted to vary the verdict of the jury unless we are convinced that the verdict is manifestly against the weight of the evidence. And we are not so convinced. Shead v. Louisiana Lumber Co., 182 Ill. App. 310. Neither can a broker be deprived of his commissions where an owner takes up and completes the negotiations himself, or the owner accepts different terms where the sale is consummated to the party originally produced by the agent. Kames v. Bacon, 209 Ill. App. 290.

For the foregoing reasons we would not be warranted in setting aside the conclusions to which the jury arrived by its verdict, and the judgment of the Circuit Court is consequently affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P. J. AND WILSON, J. CONCUR.

313 - 31934

247 I.A. 626

MARIE ALICE JOHNSON, a minor, by her guardian, Clarence E. Johnson, Appellant, v. EMIL HANSON, Appellee.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

Opinion filed Jan. 18, 1928.

MR. JUSTICE HOLDOM delivered the opinion of the court.

The trial judge sustained a general and special demurrer to the plaintiff's amended declaration, and plaintiff electing to stand by the declaration, there was a judgment of nil capiat and for costs, and plaintiff brings the record to this court for reversal.

This suit is brought under the doctrine of "attractive nuisance." It appears from the several counts of the declaration that on the 20th day of October, 1923, defendant was possessed of, etc., operating and controlling a certain runway attached to and adjoining a certain building in the course of erection, located at 11309-11311 South Park avenue, a public highway in the City of Chicago, and that said runway provided a means of access from the ground to other floors of said building; that there was a shaft in which a hoist or elevator was used to carry material from the ground floor to other floors of said building then in course of construction, a cable passing over a wheel at the side of said shaft being

used as a means whereby said hoist or elevator was moved upwards or downwards; that said building then in the course of construction, said runway, said shaft and said hoist or elevator therein were unguarded and unprotected and were plainly visible from said highway and were so located and maintained as to be attractive to children of tender years; that for a long time prior to said date, children of tender years had been in the habit of resorting to said premises and playing around the shaft and elevator and upon said runway, attracted and invited thereto by childish curiosity and instinct; and that defendant well knew of the aforesaid facts or might have known them by the exercise of ordinary care, nevertheless suffered the same to be and remain unprotected and unguarded, and negligently permitted said runway to be and remain unguarded and unprotected; that the minor plaintiff of the age of five years, drawn and attracted to said hoist or elevator by childish curiosity, and while in the exercise of ordinary care and caution for her own safety for a child of her age, intelligence, knowledge, experience and capacity, reached said shaft and the hoist or elevator therein by means of said runway negligently maintained and controlled by said defendant, etc.; that she went to and upon said hoist or elevator contained in said shaft and while thereon said hoist or elevator started downward, and her right hand became caught in the wheel, rope and other mechanism used in the operation of said hoist or elevator, by means of which the flesh and bone of her right hand was badly smashed and injured and thereafter as the result thereof the thumb upon her right hand was amputated; that after her right hand was released from the mechanism in said shaft she fell to

and upon the ground thereby sustaining bruises and injuries to her head, face, arms, shoulders, back and body, bruising and contusing the same, because of which she became sick, sore and disabled, and suffered great mental and physical pain and anguish, said injuries being both of a temporary and a permanent character, from which she has continued to suffer from thence hitherto and will hereafter continue to suffer great inconvenience, etc. during the rest of her natural life; claiming damages in the sum of $10,000.

The amended declaration to which the demurrer was sustained, consisted of four counts. By the special demurrer defendant claimed that each count was demurrable on the ground, first, that each count failed to state a cause of action against defendant because they failed "to allege that the said defendant operated or controlled the said device which is alleged to have caused injury to the said minor", and secondly, that "each count of said declaration fails to allege that the instrumentality alleged to have attracted said minor and alleged to have been controlled by the defendant, was the proximate cause of said alleged injury."

Each of the four counts states in varying language that the defendant was in possession and control of the premises particularly described in each count, and that a building thereon was in process of construction, and that the shaft, elevators, cables, etc. were in varying language attached thereto and a part thereof. We think that the avvrments of each count were sufficient to charge defendant, not only with owning and operating the premises described, but the appliances therein contained.

In the third count it is alleged that "in said building there were certain dangerous machinery, to-wit, an elevator shaft, consisting among other things, of movable platforms and certain revolving interlocking cog-wheels and ropes in connection therewith of such a character as to be attractive to children and had appealed to their childish curiosity, the dangerous character of which the defendant knew or in the exercise of ordinary care would have known; that the defendant well knowing the premises and while said building and said elevator shaft remained open and children were allowed to play in and upon it, as aforesaid, wrongfully, carelessly, negligently and improperly permitted said runway adjoining and connected to said building in course of construction on said premises to be and remain unguarded," etc.

We think that averment and the averments of a similar import in each of the other counts were sufficient to charge the defendant with the control and operation of the premises, and all of the appliances therein contained, and that there are sufficient averments in each of the counts charging that the premises and the machinery, etc., operated thereon were in law an attractive nuisance.

We have read and studied with much care all of the counts of the declaration to which the demurrer in question was interposed, and we think that each count sufficiently states the basic requirements necessary to establish liability that the defendant owned, possessed, operated and maintained the instrumentality and device which caused the injury to the plaintiff complained of and set forth with such particularity in each count of the declaration. Ramsey v. Tuthill

Material Co., 295 Ill. 395, and many other cases cited in plaintiff's brief are supporting authority for this statement.

Because the trial judge sustained the demurrer to the amended declaration and entered a judgment of nil capiat, that judgment of the Circuit Court is reversed and the cause is remanded with directions to the court to overrule the demurrer to each and every of the four counts of the declaration, and to rule the defendant to plead to the merits.

REVERSED AND REMANDED WITH DIRECTIONS.

TAYLOR, P.J. AND WILSON, J. CONCUR.

32 - 31954

MARGARET ROMANSKI, insane, by John Romanski, her guardian, Defendant in Error,	ERROR TO SUPERIOR COURT, COOK COUNTY.
v.	
JULIUS (JOHN) SZLICKI, Plaintiff in Error.	

Opinion filed Jan. 18, 1928.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This is an action on the case for assault and battery, which is attributed to defendant's driving his automobile with great force and violence and at a high, dangerous and unlawful rate of speed against the plaintiff, Margaret Romanski, injuring her.

The case went to trial upon an amended declaration of five counts to which defendant interposed a plea of not guilty, to which plaintiff joined issue by the filing of a similiter.

The cause was tried by a jury which rendered a verdict for the plaintiff, assessing her damages at the sum of $12,000, upon which verdict the court rendered judgment after overruling defendant's motions for a new trial and in arrest of judgment. The record is before us for review at the instance of defendant.

It is averred in the amended declaration that the defendant with his automobile struck the plaintiff on June 21,

Opinion filed Jan. 19, 1954.

1920, at the intersection of Park avenue and 155th street, Harvey, Cook County, Illinois, while driving his automobile at a speed of 20 miles an hour, and knocked her down and hurt and wounded her, fracturing and breaking her right leg in two places, injuring her spine, back and hips, and fracturing several of her ribs, and tore away a large chunk of flesh out of her right thigh, and injured her left leg, arms, face, head, eyes, ears and body, and internally injuring her, and she suffered great pain, etc., and was compelled to pay out the sum of $700 in endeavoring to be healed of her injuries thus suffered.

Plaintiff's evidence develops that on the occasion in question she was walking with one Michael Waldent, in an easterly direction on the north side of 155th street; that when they approached the west curb line of Park avenue, a north and south street, they noticed defendant's automobile crossing the Illinois Central Railroad tracks about 35 feet east of the east curb line of Park avenue; that the accident happened about 12;45 P.M.; that the automobile of defendant was running about 20 or 30 miles an hour; that plaintiff and the witness Waldent saw defendant's automobile first when on the west curb of Park avenue; that plaintiff and Waldent thought the automobile was going straight west, but that it turned suddenly and unexpectedly to the north, and that in turning in Park avenue defendant's automobile struck the plaintiff.

A Harvey policeman testified that he arrived at the corner of 155th street and Park avenue three or four minutes after the accident; at the time of the accident he was in the

middle of the block in Park avenue between 154th and 155th streets; he saw a car stop and he went down to see what it was, and that he saw the defendant sitting in the car, and that he smelled liquor on his breath; that he told defendant to get out of the car and that defendant did so, and in so doing staggered and almost fell down.

Margaret Romanski, the plaintiff was declared insane in the County Court on the petition of her husband in March, 1926, six years after the accident; she has never been confined in an institution for the insane.

Counsel for defendant called his client to the witness stand as a witness in his own behalf, and counsel for plaintiff objected to his competency as a witness. His objection being sustained and defendant offering no further evidence, the cause went to the jury upon the case as made by plaintiff's evidence.

Defendant, before the argument to the jury, presented to the court two special interrogatories, which he requested the court to have the jury answer with their general verdict, -

> "1. Was the defendant driving the motor vehicle in a drunken or intoxicated condition at the time of the accident in question?"

which was answered by the jury "yes".

> "2. Did the defendant intentionally and with malice strike the plaintiff with his automobile?"

And the jury answered this "no".

Defendant after the rendition of the verdict moved to set aside the special finding of the jury to the first special interrogatory, and requested the court to enter judg-

ment in favor of defendant on the answer of the jury to special interrogatory No. 2, which motions the court denied.

No questions arise upon the pleadings. Neither is it argued that the amount of the verdict is excessive, nor does defendant argue for reversal the ruling of the court in sustaining the objection made by plaintiff's counsel to defendant's testifying as a witness in his own behalf. The questions argued for reversal are that the verdict is contrary to law and the evidence; the overruling of defendant's motion for a directed verdict at the close of the evidence; that the court erred in giving instructions 9, 11, 12 and 14 proffered by defendant, and in refusing to set aside the special finding of the jury to interrogatory No. 1, and in overruling the motion of the defendant to enter judgment in his favor on the jury's answer to special interrogatory No. 2. Also argues for reversal improper conduct and improper remarks of plaintiff's counsel in the conduct of the trial, and his argument to the jury, which conduct, it is contended was prejudicial to defendant's rights.

We will decide these points in the inverse order in which they are above stated.

The conduct of counsel for plaintiff in not submitting to the rulings of the court on objections to questions, and his intemperate remarks to the jury, are not to be commended, and were this a close case upon the merits the indiscreet conduct of counsel in this regard would be sufficient for the court to reverse the judgment and award a new

trial. Counsel's persistence in repeating questions, or those like unto the questions to which the court had sustained objections, was highly improper, but the rulings of the court, we think, were a sufficient corrective. The statement of plaintiff's counsel to defendant's counsel, that "you have no more respect for the intelligence of this jury than you have for a bunch of rabbits" was highly improper, and while the court struck the remark from the record plaintiff's counsel continued in an attempt to justify his statement. Furthermore his argument to the jury in which he said "I say to you, when a woman has lost her reason from this kind of an accident, it would have been better if she was killed at the time she had the accident. Much better. It would save her lots of suffering. She is no good to herself in this world and to anybody else. Take it home to yourself, a sister insane, a brother insane, a wife insane" was an improper appeal to the passions of the jury, and should not have been made. In no way can such conduct be approved, and if plaintiff's case had been close upon the evidence, such conduct would cause a reversal.

Defendant's counsel in support of his contention that the conduct of plaintiff's counsel, as above recited, is sufficient cause to call for a reversal of the judgment, cites Bishop v. Chicago Junction Railway, 289 Ill. 65, where the court said:

> "The rule in this State must be regarded as settled that misconduct of counsel of the character mentioned is sufficient cause for reversing the judgment, unless it can be seen that it did not result in injury to the defeated party. The questions to be determined are, therefore, whether the improper argument was of such

character as was likely to prejudice the defendant, and, if so, was the verdict so clearly right that a new trial ought not to be granted because of such prejudicial argument."

We concede that the foregoing is a trite and true statement of the law on that subject. It is therefore apparent, the evidence considered, being that of plaintiff without contradiction, that notwithstanding the misconduct of plaintiff's counsel, defendant's rights were not prejudiced, and that the verdict is "so clearly right that a new trial ought not to be granted because of such prejudicial argument" and comment. We cannot say in the language of Mattice v. Klawans, 312 ibid, 299, that "the verdict obtained by unfair and unprofessional conduct of an attorney will not be permitted to stand", but do say that the verdict was founded upon the merits of the case, as abundantly proved by plaintiff's uncontradicted evidence, in spite of her counsel's misconduct.

The special interrogatories were asked the jury at the request of defendant, and they were answered as the result of such request by defendant, and he is thereby estopped from now complaining of what the court did on his own urging, and as the answers are responsive to the interrogatories, the court did not err in refusing defendant's motions, as above recited.

Defendant contends that the verdict should have been instructed in his favor on the jury's answer in the negative to the special interrogatory, "Did the defendant intentionally and with malice strike the plaintiff with his

automobile"; and contends under Section 79, Chapter 110, Illinois Statutes "effect should be given to the special finding when inconsistent with the general verdict", and that the court may render judgment on the special finding without regard to the general verdict, but the special finding and the general verdict are not in law inconsistent.

In Vol. 2 Ruling Case Law, 537, section 5, it is stated that:

> "Where, however, the basis of an action is assault and battery and not simple assault, the intention with which the injury was done is immaterial so far as the maintenance of the action is concerned, provided the act causing the injury was wrongful, for if the act was wrongful, the intent must necessarily have been wrongful,(citing authorities) and the fact that an act was done with a good intention, or without any unlawful intention, cannot change that which by reason of its unlawfulness, is essentially an assault and battery, into a lawful act, thereby releasing the aggressor from liability."

And in Vol. 2 American & English Encolycopedia of Law, 2nd ed. page 953, the doctrine is thus stated:

> "To constitute an indictable assault or battery, there must always be an intent, expressed or implied, to do an injury to another; but one may be liable in a civil action, for assault or battery, where there was an entire absence of the intent to do any injury, the ground of liability being that the assault was committed in the pursuance of an unlawful act or was the result of negligence."

The defendant in driving his automobile when he was not sober at an excessive rate of speed was guilty of negligence and the act became and was unlawful.

In Kirton v. North Chicago Street Ry. Co., 91 Ill. App. 554, in which assault and battery was charged the court said,

> "Any unlawful act committed with violence to the person of another, is trespass. One who does an unlawful act, or a lawful act in an unlawful manner, to the injury of another, is liable as a trespasser.
>
> In such case the person injured may be entitled to recover damages, whatever may have been the trespasser's motive. Want of malice is not a bar to a right to recover. * * *
>
> The question of whether the act was wilful, wanton or malicious relates only to damages, not to the right to recover. If the act complained of be wilful, wanton or malicious, the jury is authorized by the law to give smart money or punitive damages."

In Williams v. Kaplan, 243 ibid.164, the court said,

> "Not infrequently the law imputes to a wrongdoer an intention which as a matter of fact, he did not possess, and as Salmond says (Salmond Jurisprudence, 7th Ed. p. 387): 'The reason for the recognition by the law of such cases of constructive intention is the expediency of extending to the more serious forms of negligent wrongdoing, the liability or additional liability attached to wilful wrongdoing.'"

So that when defendant unlawfully drove his automobile so that, as a result of such unlawful act, he knocked down and injured the plaintiff, he was guilty of an assault and battery of the plaintiff.

We find no error in the giving of instructions 9, 11 and 12. There was testimony to sustain the contention that plaintiff's mind had been impaired as the result of the accident and was proper to be considered as an element of damage, as stated in instruction number 9.

In instruction number 11 it was a correct statement therein that the "law made it the duty of the defendant, in

turning to the right from said 135th street into Park avenue, to keepato the right of the center of such intersection of such highway", so that the jury might find that a failure so to do was negligence and an unlawful act, which resulted in the assault and battery of plaintiff complained of.

Instruction 13 instructs the jury regarding a violation of the Motor Vehicle Law of Illinois. This is but a reference to another form of negligent conduct on the part of the defendant. If the violation of the act is not proof of a wilful and intentional injury, it is proof that a violation of the motor vehicle law is in itself evidence of negligence. A violator of that law is guilty of unlawful conduct and such violation by the defendant terminated in the assault and battery complained of in plaintiff's declaration.

Defendant's objection to instruction 14 lies in that part of the instruction which says, "the plaintiff would be entitled to recover, although you may believe from the evidence that the plaintiff was guilty of contributory negligence." Contributory negligence is not an ingredient, as a matter of law, in a case of assault and battery. It would have been wise to have omitted this instruction, as it had no place in it, but it was harmless and did the defendant no injury. It would be captious and altogether illogical to hold that the giving of instruction 14 as to the effect of contributory negligence, constituted error which should work a reversal of the judgment.

The court did not err in denying defendant's motion for an instructed verdict at the close of the proofs, for in the condition of the evidence of plaintiff, uncontradicted

as it then was, it was the province of the jury to pass upon its probative force as a question of fact. It was not a question of law for the court.

And finally the verdict is abundantly supported by both the evidence and the law contained in the instructions given to the jury. On the merits the case is clear and abundantly sustains the verdict and judgment.

The errors in procedure heretofore pointed out are not such as to warrant a reversal of the judgment. Consequently the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND WILSON, J. CONCUR.

39 - 31968

KENNIS BRANNOCK, Appellee, v. FREDERICK H. HERDRICH, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Jan. 18, 1928.

MR. JUSTICE HOLDOM delivered the opinion of the court.

The plaintiff, a real estate agent, was employed by the defendant to sell his premises at 348 West Chicago avenue, Chicago, for the sum of $22,000, for which he agreed to pay a commission at the regular real estate board rate; that plaintiff sold the property to the Mission Friend Publishing Company for $22,000, a purchaser who was ready, willing and able to buy and pay for the same at the agreed price. Defendant refused to make the sale. The cause was submitted to the trial judge by agreement, and there was a finding in favor of the plaintiff and a judgment on the finding for $[illegible]. Defendant brings the record to this court for review.

There was no dispute between the parties in regard to the foregoing facts. The only defense made by the defendant was that the plaintiff subsequently to defendant's refusal to sell to the Mission Friend Publishing Company, sold to that company a piece of property in the same block for $18,000, and that on that sale plaintiff received a commission of $540, and defendant claims that he is entitled to a credit of that

amount against plaintiff's claim, and that defendant was entitled to such credit in the way of mitigation of damages. This defense was set up in defendant's affidavit of merits.

Defendant now contends that the trial judge erred in not permitting defendant to avail of the sale made by plaintiff to the Mission Friend Publishing Company of the $18,000 property, and to be credited with the amount of plaintiff's commission on that sale. With this contention we are unable to agree. When plaintiff brought to the defendant a purchaser, as he did, who was ready, willing and able to buy the property on the terms exacted by the defendant, and defendant refused to complete the sale and convey the property, the transaction between them was completed and a cause of action remained to plaintiff to recover the amount of his real estate brokerage, as claimed by him in this suit. What plaintiff did after that incident was no concern of the defendant. While before that time he was in his employ for the purpose of making the sale, after that time no contractual relationship whatsoever existed between them.

To sum up the situation, plaintiff sold for $22,000 defendant's property, as agreed, to the Mission Friend Publishing Company, and after defendant's refusal to carry out his contract he soldafor a thirdparty another piece of property in the vicinity of defendant's for the price of $18,000, for which he was paid a commission of $540. In effect plaintiff had sold two pieces of property on both of which he had earned a commission. If defendant had owned both pieces, he would have been compelled to pay plaintiff a commission on the total

amount of both sales, being $660 plus $540 for the second sale. The second sale was an independent transaction in which defendant was in no way interested. It is patent that plaintiff used his time, his efforts and his experience in selling defendant's property, and when defendant receded from his contract and refused to carry it out, then plaintiff expended like effort, experience and time in negotiating the sale to the Mission Friend Publishing Company of the second place of property, - two independent transactions- and in no way connected. In the second transaction defendant had no interest.

It is true that defendant has been unable to cite any case directly supporting his contention. However, he cites two cases, first, Canton Hughes Pump Co. v. Llerna, 305 Fed. 209, and second Barnett v. Furniture Co., 130 Ill. App. 510. Neither of these cases is in point, either in fact or legal principle. The first case involved the sale of a pump, and Llerna, who procured the sale, was promised a commission of $4,000, and after making the sale the Pump Company refused to sell the pump. Thereupon the agent procured a similar pump from the Pittsburgh Pump Company, for which service, he was paid by the Pittsburgh Pump Company $3300 for his commission. In allowing the credit the court said: "So far as the briefs of counsel indicate or our investigation discloses, the question, as applied to the facts, is novel, and we must decide it according to what we think the controlling principles and without the aid of precedent."

In the first place we do not regard the case as involving the same questions as are here in dispute, and

further we do not feel that the case was well decided. It is apparent that no supporting case could be found either anterior or subsequent to that decision, and as it has no appealing force to us, we disregard it as inapplicable, whether the decision was right or wrong. This is not a case for damages for non-performance of a contract. It is an action for a real estate brokerage commission earned by the plaintiff from the defendant, about which there is no dispute.

In Barnett v. Furniture Co., supra, the writer of this opinion wrote the opinion in that case. That is not applicable because it was a question of the breach of contract of employment, and plaintiff there was entitled to recover, as he did, an amount sufficient to make him whole had the contract not been breached by the defendant. That decision rests upon the axiomatic principle that the servant in the breach of an employment contract by the master was bound, as far as he reasonably could, to minimize the damage by obtaining other employment and doing other work.

The brief of counsel for defendant is novel and interesting, but it is without legal vigor.

No reason appearing why the finding and judgment of the Municipal Court should be reversed, that judgment is affirmed.

AFFIRMED.

TAYLOR, P.J. AND WILSON, J. CONCUR.

further on in this land this day and age was not a right. It is unusual that an accounting case is in front either matters or concerned to that extent, but it has an opinion from us, we disagree it we [illegible], whether the decision was right or wrong. This is not a case for damages for non-performance of a contract. It is an action for a [illegible] declaration [illegible] plaintiff from the defendant, which their is no liability.

In Dennis v. Commissioner [illegible], the court of this country made its opinion in [illegible] case. That is not applicable because it was a question of the [illegible] of employment, and it only [illegible] to recover, so to [illegible], we cannot [illegible] to make this order but the matters are here concerned in the [illegible] that [illegible] the [illegible] of the [illegible] against the [illegible] of the [illegible] the [illegible] by [illegible] [illegible] [illegible] [illegible].

The usual of counsel for [illegible] in [illegible] [illegible] [illegible] [illegible].

In making [illegible] the [illegible] and judgment of the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible].

[illegible]

445 - 31577

247 I.A. 626

FRED BUTTRICK, Appellee, v. YELLOW CAB COMPANY, a corporation, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

Opinion filed Jan. 18, 1928.

MR. JUSTICE WILSON delivered the opinion of the court.

The amended declaration in this cause, consists of seven counts. The first count charges that on June 27, 1923, the defendant was operating a certain motor vehicle over and along a certain highway in the City of Chicago, to-wit: Harrison Street; and that it was its duty to exercise ordinary care in the management and operating of said vehicle; that the plaintiff, in the exercise of due care for his own safety, was walking along and upon said Harrison street at said intersection of Harrison and Central Park Avenue; and that the defendant negligently ran into and against the plaintiff, thereby injuring his. The second count is practically the same except that it charges failure to give warning of the approach of the motor vehicle. The third count charges a violation of the Motor Vehicle Act. The fourth count also charges violation of the Motor Vehicle Act. The fifth count charges failure of the motor vehicle to be provided with good and sufficient brakes. The sixth count charges a violation of the statute of the State, requiring motor vehicles to drive a certain distance from street railway cars which are dis-

charging passengers. The seventh count charges violation of the statute in that it failed to provide and use lamps or lights visible for 300 feet, in advance of the motor vehicle.

The testimony discloses that Fred Buttrick, plaintiff below, was 51 years of age and had the sight of only one eye; that on the night of the 23rd of June, at between 11:30 and 12 o'clock, he had alighted from a street car which was going in a westerly direction on Harrison street, and which had stopped at the intersection of Harrison street and Central Park avenue, a north and south street in the City of Chicago; that he stepped off therear end of said car and walked behind it in a southeasterly direction. The testimony further shows that an east bound car on Harrison street had stopped at the opposite side of Central Park Avenue, at about the same time that the west bound car had stopped at the east crosswalk, and had then proceeded east over and along Central Park avenue, and was approximately in the center of Central Park avenue, when plaintiff appeared from behind the car upon which he had been riding. It appears further that a Yellow Cab had also stopped at the west side of Central Park Avenue, just back or about at the rear end of the east bound street car, for the purpose of allowing passengers to alight from that car, and that this car started up at about the same time the car did, and proceeded in an easterly direction along Harrison street, over and across Central Park Avenue, in the same direction as the street car and just south of it. Buttrick crossed over the south track of the street car line, proceeding in a southeasterly direction, and nearly reached the curb on the south side of Harrison street, at a point approximately 75 feet

Fighting pneumonia. The modern usual method involves injecting a germicide in that is toxic to germs or lights visible for the germs, in spaces of the water vapor.

The testimony of witness Guy Lee Dutright, plaintiff below, was to the effect that on the night of the 12th of June, at about 11:00 o'clock, he had climbed from a street car which was going in a southerly direction on Sixteenth Street, and had stopped at the intersection of Jackson Street and Tenth Avenue, a north and south street in the city of Kansas City, that he stepped off between one of said car and a parked Ford, and that he was on Sixteenth Street in the opposite side of Jackson Street across, at about the same time that the truck owned and driven by the most defendant, and then proceeding east and along Jackson Street across, and was approximately in the center of Jackson Tenth Street, when plaintiff approaches from behind the car upon which he had been riding. It appears further that a fellow had been sitting at the back side of Jackson Tenth Avenue, just back of front at the rear end of the first parked street car, for the purpose of allowing passengers to alight from that car, and that the car started up at about the same time the car did, and then moved in an slightly diagonal line across Sixteenth Street and across Jackson Street, in the same direction as the street car and just behind it. Plaintiff crossed over the street car and just behind it. Plaintiff crossed over the south track of the street car line, necessarily in a southwesterly direction, and shortly thereafter the car on the south side of Jackson Street, at a rate approximately 25 feet

east of the southeast corner of Central Park Avenue and Harrison street. After the accident, the front of the cab was approximately in a line with the front of the east bound street car and the right wheels of the cab were up and over the curb. The testimony shows that the plaintiff had a bottle partly filled with liquor in his pocket at the time of the accident, but there is no evidence of intoxication. No question is raised as to the extent of the injuries sustained. A jury returned a verdict of $5,000 and judgment was entered on the verdict.

The only testimony as to the rate of speed at which the cab was going is that of the driver, who testified he was going at around 10 or 15 miles per hour. The only testimony as to the speed of the east bound street car, is that of the motorman who testified that he was going about 8 miles an hour. It appears that at the time of the accident there was no other traffic on the street. The district in question appears to be part residence and part business, but on account of the lateness of the hour, we can safely assume there was not much business being done and there does not appear to be any evidence of any other traffic on the street or in that neighborhood. The cabman testified that he was going home; and that he lived about one and a half blocks from the corner in question. It appears that the distance from the south rail of the east bound track to the south curb of Harrison street was 13 feet 10 inches, and that the distance from the east curb of Central Park avenue to the entrance of the garage on Harrison street was 330 feet; and the height of the south curb was seven inches.

From the foregoing facts contained in the testimony

most of the northern waters of Central Park Lake, and Barbara wherein. After the accident, the chief of the gang was arrested in a line six. The jury of the case found always not and the right wrong of the lady by in dat over the week. The training shown that the principle had a bitter partly filled; liquor in his power at the time of the accident, it was in a criminal of insanity. A question is raised as to the extent of his criminal punishment. A jury returned a verdict of 5,000 and judgment was entered on the verdict.

The only testimony in the case of proof is that the man who was going in that of the driver, the activities the was going at around 10 or 12 miles per hour. The only testimony as to the speed of the car was given out, in that of the motorman who testified that he was going about a mile in half. It appears that at the time of the accident this car was in fact shuttle on the wheel. The injured is CHARLES TIMOTHY, he was unknown and just twelve, but an element of the Takeman of the Bros, of the safety cause this was not some believes that the jury that the car was in the wrong manner of any other training on the street or in the neighborhood. The common testimony was by the jury that the car in fact shown you was a fair review from the motor in question. It appears that the witness from the evidence of the last bound train to the bank with a certain client was 18-feet in length, but that the witness from the last car of the train was the manager of the system of the [illegible] with the [illegible] of the [illegible] and [illegible].

The [illegible] in the [illegible]

it would appear that it would not be necessary to consider the third count of the amended declaration, which is predicated on the statute concerning drivers of motor vehicles and their obligation when passing through business districts or resident districts, as it is evident that the cause of accident was not the rate of speed at which the cab was traveling, with reference to the built up portion of any town or village. For the same reason it is not necessary to consider the fourth count of the declaration. There is no testimony as to the condition of the brakes and for that reason the fifth count should be disregarded. The sixth count, pertaining to the statute in regard to motor vehicles passing standing street cars, has no application in this case, because of the fact that the motor vehicle was going in the same direction as the car. The seventh count should be disregarded because it is apparent that the plaintiff did not observe the cab, as he was walking in a southeasterly direction, so that the failure of the defendant in providing the lights required by the statute would not be sufficient to warrant a recovery. Thus we have for consideration only the first count of the declaration, which charges negligence in general terms; and the second count, which charges that the driver of the motor vehicle failed to give warning of his approach.

A release signed by plaintiff on June 24, was introduced in evidence as one of the defenses. In regard to this, plaintiff testified that he did not remember when he signed it, and did not know Murphy, the man who presented it; that at the time he was in pretty bad condition and did not know how much the release was for; that the money was left lying on his bed; that he was suffering pain; that he has never seen

the money since it was left by Murphy; that he did not remember signing the release, but that it was his name which appeared on it; that he had taken an opiate, and that he remembered the man saying something about wanting to help him and that he would be back.

Paul Dressler, a witness on behalf of the plaintiff, testified that he was in the neighborhood on or about June 23, and there was an automobile accident about 11:45; that he had put his car in the garage and started east when he heard a crash on Harrison street and looked around, and there was a man, apparently knocked down in front of a Yellow Cab; that he did not hear any horn blown and that the accident happened about 50 feet east of Central Park Avenue; and the street car was standing opposite the car; that the garage in which he had put his car was east of Central Park avenue and he was just coming out of the door when he heard the noise; and that there was a light on the southeast corner of Central Park avenue.

Stanley Flarpe, a witness on behalf of the plaintiff, testified that he was standing in front of the garage, which was on Harrison street, east of Central Park avenue, when the accident occurred; that he heard the crash and looked to see where the noise came from, and it was about 100 feet west of where he was standing, on Harrison street; that there was a street car standing at a point about even with the taxi-cab; that he did not hear any horn or street car bell; that there are no stores on Harrison street east of Central Park avenue except the garage, and no residences, but it is a business and

residential district; that Dressler had just brought in his car and he was on his way out when Dressler came in; when the crash came Dressler was going east on Harrison street and had not yet driven into the garage; that Buttrick was under the cab when he reached the scene of the accident and they pushed the cab two or three feet west.

On behalf of the defendant, Daniel Madigan testified that he was a police officer of the City of Chicago; that on the night in question he was coming home from work on this street car going east on Harrison street and was sitting in a front seat reading his newspaper; that the car stopped about 100 feet east of the intersection and he stepped out and saw a Yellow Cab stopped at about the front step of the street car; that a man was lying in front of the Cab in the street, between the street car and the cab.

Michael Harris, witness for the defendant, testified that he was a collector for a wholesale clothing house, and was on the corner of Harrison street and Central Park avenue, which was a block and a half from his home; that the accident occurred about twelve o'clock mid-night; that he saw a man jump off the car before it came to a stop and run around the corner of the street car at the rear end; that he heard a crash and ran and saw that the man had been hit; that this man ran in front of the east bound car; that he had seen the Yellow Cab prior to the time of the accident and that he heard a horn blow and there were no other automobiles in the vicinity except this Yellow Cab; and that the man did not look at all when he got to the south rail of the west bound track.

Thomas Murphy, testified on behalf of the defendant that he was an employee of the Yellow Cab Company and that he obtained the signature of the plaintiff to the release in question; that he gave him $100.00; that at that time he told him the Yellow Cab Company was willing to spend about $50 on the case, from a nuisance standpoint, and explained to him what he meant by "a nuisance standpoint"; that he finally raised it to $75; that the plaintiff held out a little, and he finally gave him $100.00. Defendant's Exhibit 1, is a release in the usual form signed by Fred Buttrick, and the consideration is the sum of $100. Defendant's Exhibit 2, is a statement as to how the accident happened, signed by Buttrick, in which he states that he hurried and beat this street car, and after he had passed it he was struck by the cab; that he had a few drinks of Moonshine whiskey at the Pier, but was not intoxicated.

Walter Randy, a witness for the defendant, testified that he was the driver of the Yellow Cab, at the time of the accident but was not in the employ of that company at the time of the hearing of this case; that he left the company in October, 1935; that he had driven a machine four or five years; that he had a car in his own family; that he had a license; that on the night in question, at about 12 o'clock, he was driving east on Harrison street and stopped on Central Park avenue; and there was a street car alongside of him; that a lady got on the street car and he started up when the car started; that he did not see the plaintiff until the cab had gone 50 or 75 feet east of Central Park avenue, and he, the witness, was alongside the front steps of the car; that he first saw the plaintiff crossing in front

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of the eastbound car and when he jumped in front of the cab he was five or ten feet from the front end of the machine; that the cab was going 10 or 15 miles an hour; that there was nothing else going west except the cab and the street car; that when he saw the man he honked his horn and put on the brakes, and the right front wheel swung to the curb and went up on the curb, but he had already hit the man, and had stopped; that he put the man in the cab and took him to the hospital; that he had lights known as parking lights, which are larger than curb lights, on the side of the cab by the windshield; that he lived about a block and a half from the point in question; that when he had started up he had thrown his car into second, but he did not sound his horn until he saw the man jump in front of him.

Elizabeth Fugmann, a witness for the defendant, testified that she lived at 3562 West Harrison street; that she was sitting on the bottom step of her stairway, near the sidewalk, at the time in question; that she saw a west bound Harrison street car slowing down; that a man stepped off the back platform and started south across the street; that he rushed across and got in front of that car; that she heard brakes of a machine and went across the street; that the Yellow Cab was standing there with one wheel on the curb. She also testified that she could not say whether she heard a horn or not.

Joseph Philip Shea, a witness produced on behalf of the defendant, testified that he was a motorman for the Surface Lines and had worked for that company about four years;

that he was the motorman of the east bound street car at the time of the accident; that he was on the front platform; that he did not see the cab until it was alongside of him and the man was hit; that he saw a man go in front of this car, about ten feet ahead of it; that he was running across going south; that he put on his brakes and the next thing he knew he saw the cab hit him; that when he started up he had his controller at the fifth point, about eight miles an hour; that when he was 50 or 100 feet east of Central Park avenue he was going about 8 miles an hour.

Charles J. Arp, witness for the defendant, testified that he was a conductor for the Surface Lines, and was on the east bound car on Harrison street at the time of the accident in question but did not see anything of it until after his car had stopped; that he helped place the man in a cab and that the cab was about even with the front vestibule of his car.

Charles Ray, a witness on behalf of the plaintiff, testified in rebuttal that he was an investigator for counsel for the plaintiff; that he talked with Mrs. Fugmann (the witness hereinbefore referred to) that he wrote a statement from her which he did not remember whether he read to her or not; that at that time she stated to him that plaintiff walked south after he got off the car and behind it, and at the time a Yellow Cab was running faster than the street car, which was running at the usual rate of speed at which they run between intersections; that she heard no horn sounded; that Sandy, the driver of the cab told her he was driving east in Harrison street on the east bound track at a moder-

ate rate of speed, and that at a point about 100 feet east of Central Park avenue he was passing a couple of west bound cars, and when the car came opposite him a man came out from behind.

This concluded the testimony on both sides, and it is insisted upon behalf of the defendant below that the evidence does not show ordinary care on the part of the plaintiff. And, to substantiate that position, argues that in crossing behind the car he was not on a crosswalk properly provided for crossing the street; that after he saw the approaching car on the east bound track, he walked the rest of the distance across the street without looking, and that he should have known that it was customary for vehicles to travel in an easterly direction on that part of the street; that there was nothing unusual about the speed of either the street car or the cab, both of which had started from a standing stop and could not have acquired any considerable speed within the distance from the time they started up to the time of the accident.

On behalf of plaintiff below, it is argued that the rule of law announced in the case of Stack v. East St.Louis Ry. Co., 245 Ill. 308, is applicable to the case at bar; and that under that decision the courts have laid down no precise rule of action to be observed by a man, passing behind a street car, who finds himself suddenly confronted, without warning, by a rapidly moving car or other vehicle. And further, as announced in said opinion, that while he might have avoided the accident by the exercise of a high degree of care; this was not required of him because he had a right to rely

upon his sense of hearing as well as his sight, and to expect defendant below to give warning of its approach; that it was a question of fact for the jury, under all the circumstances, to decide whether or not the defendant had exercised due care in running past a street car at the point in question; and whether or not it was necessary, in the exercise of such care to have sounded a warning of its approach, so that the plaintiff below would have been apprised thereof. To this rule, as announced by our Supreme Court, counsel for defendant below insists that the driver of the cab could not be expected to apprehend the crossing of a person at this distance from a street intersection; and that he had his car under control as was shown by the fact that at the time he stopped his cab it was on a line with the vestibule of the street car in front of which plaintiff below had just passed.

From the facts in the Stack case, it appears that the deceased alighted from the rear platform of an interurban car going west on State street, in the city of East St. Louis, which had stopped at the west side of Sixteenth street, an intersecting street. He passed around the rear end of the car to go south, and at the time he was struck was evidently on the crosswalk where pedestrians would naturally be expected to stand. It appears from the opinion of the court, at page 311, "that the gong was not sounded within fifty or sixty feet of the crossing where the deceased was struck, and that the east bound car was within two or three feet of him as he came from behind the west bound car." There was also evidence that the car was running at a rate of speed greatly in excess of the speed

upon his sense of propriety as well as his ego, and to appeal determined below by some sequence of his conscience, that is one a question of less for his party, under all the circumstances, he finally chooses to act in accordance but concluded due note in making such a point one of the point in question, and whether or not it is his conscience, in the analysis of such case to have exceeded a proper of its sources, in this all classify which would have been involved a-fact, in this rule, as described by our Western Scott, should in particular lay lacking that the drives of his and would be objected to sure-bound to consider of a person of this lifetime from a great interaction, and that to all the other conflict as was shown by the fact that of the that to observe his and it was on a line with the constitution of the which he is from of which plausible below but not proved.

Then the tender in the Last Time, it matter that the decision although the for lacking of a interaction one going was to have advent, in the city of East St. Louis, which has standing of the west side of Sixteenth street, an intersection street. In passing around the road and in the car to go right, and of the time he was issues was activity on the commission where politicians would naturally be concerned in point. It is also the opinion of the court, in page 821, that at the time the annual eighth fifty on state face of the activity after the lawsuit was where, and more in will Senate and the eighth two or three face of the so to come they behind the west house out, Senator was also argument that by of the running of a case of speed exactly in course of the speed

limited by ordinance.

In the case at bar the facts are that the car upon which plaintiff was riding was a west bound car and had stopped at the east side of Central Park avenue; that the plaintiff alighted from the rear end of this west bound car and walked around the rear end, - not on the crosswalk but at least a distance of the length of the car, and probably more, from the crosswalk which was provided for the purpose of permitting pedestrians to cross the street. It appears, moreover, that there is no question in the case at bar such as was involved in the Stack case, namely, the degree of care required of a person who finds himself suddenly in a position of danger. It appears from the testimony in this case that Buttrick, after passing around the end of the car from which he had alighted, perceived the oncoming east bound car and still proceeded across the track in a southeasterly direction; and at no time was aware of the approaching cab nor did he take any steps to discover whether or not there was a cab or motor vehicle proceeding east on the street in question, running parallel with the east bound street car.

The court in the Stack case has distinguished that case from the case of Chicago City Railway Company v. O'Donnell, 208 Ill. 287, which, in turn follows the rule announced in the case of North Chicago St. R. R. Co. v. Cossar 203 Ill. 608. In this latter case, the court in its opinion says:

Liability in tort.

In Donoghue v. Stevenson, [illegible] was a snail found in a ginger beer bottle which plaintiff had purchased and drunk from. The House of Lords held that a duty of care was owed by the manufacturer to the ultimate consumer, even though there was no contractual relationship between the parties. The decision was based on the principle of proximity, that is, the relationship between the parties was such that the defendant could reasonably foresee that his negligent act would be likely to injure the plaintiff. Lord Atkin said:

> You must love your neighbour to obey the law. The lawyer's question, who is my neighbour, receives a narrow answer. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

In Donoghue v. Stevenson, the House of Lords held that one owed a duty of care to the ultimate consumer. But in Grant v. Australian Knitting Mills Ltd., the Privy Council, on the same facts, held that no duty was owed to the ultimate consumer.

"Nor should the inquiry in regard to contributory negligence by the deceased have been directed only to the evidence of what the deceased did at the time of receiving the injury. The claim of appellant is, not that he then failed to do what a man of ordinary caution would have done to avoid injury, but that he failed to do what a man of ordinary caution, under like circumstances, would have done to avoid placing himself in a position from which he could not escape without being injured. One who, failing to observe due care, blindly walks into a danger that the observance of due care would have enabled him to avoid is no less guilty of contributory negligence than he who by the observance of due care could extricate himself from danger fails to make any effort for his personal safety, and because thereof is injured."

It appears in the case at bar, that after the plaintiff discovered the oncoming east bound car, and saw that he could pass over that track in safety, instead of the fact that there was an oncoming east bound car being a warning to him, the plaintiff nevertheless utterly failed to consider that there might also be an oncoming east bound motor car running parallel with the street car. The situation created was such that if he had discovered the oncoming east bound cab, he was evidently in a position from which he could not possibly extricate himself, because it would be dangerous to go ahead and dangerous to go back; and the situation created thereby would be very similar to that which arose in the case of Roberts v. Chicago City Railway Co., 262 Ill. 238, where the deceased attempted to cross the street, not at an intersection and between two approaching cars, with the result that after crossing over in front of one car, he found that he would be struck by the car going in the opposite direction, and, in that extremity, he jumped back and was killed by one of the two cars in question. While it is true that in the Roberts case the court said that the deceased could see

the two cars, and that it might be argued that in the case at bar the plaintiff did notsee the Yellow Cab, nevertheless, it is a matter of common knowledge that motor cars are liable to be running in the same direction and parallel to street cars; and as the point of the accident was seventy-five feet east of the east crosswalk of Central Park avenue, by the exercise of ordinary prudence, he should have known that such motor cars would not anticipate that persons would appear from in front of the east bound street cars; and that at least they would not be called upon to exercise any greater degree of care for his safety than, under the circumstances, he would be called upon to exercise for his own safety.

The Supreme Court in the Roberts case, at page 331 of its opinion, says:

> "He was not on a crossing for pedestrians and needed no warning or signal that the two cars were approaching each other, - a fact that no one could fail to observe. The evidence raised no issue of fact proper to be submitted to a jury, and the court erred in not directing the verdict."

In the case at bar, the cab had crossed over the street intersection provided for pedestrians and had reached a point where it became unnecessary for the driver to anticipate the necessity of warning people who might cross at that point. On the part of the plaintiff, he should have known that the same reason, that would require a motor car to sound a warning on approaching a crosswalk, did not exist as to one which had crossed over such crosswalk and was seventy-five or one hundred feet beyond. Again, in the Roberts case, the Supreme Court in its opinion, at page

233, after commenting on an instruction embodying the rule as to persons confronted with sudden danger, says:

> "This has sometimes been said to state an abstract rule of law, but strictly speaking, the only rule of law is that parties placed in the position of Smith and the defendant's employees must each use ordinary care, reasonable care or due care, which are convertible terms, and mean that degree of care which ordinarily prudent persons are accustomed to exercise under the same or similar circumstances."

In the case at bar, when the plaintiff saw the oncoming street car, his attempting to cross the street in front of said car in the manner and under the circumstances shown in this case, and without ascertaining whether or not a motor car was approaching, would, as we have stated, constitute such contributory negligence on his part that it must be held, as a matter of law, that he was guilty of such contributory negligence as would preclude his right to recovery.

For the reasons stated in this opinion, the judgment of the Superior Court will be reversed and the cause remanded.

REVERSED AND REMANDED.

HOLDOM, J. CONCURS;
TAYLOR, P.J. DISSENTS.

73 - 31678

R. M. DUNN, Plaintiff in Error, v. SIDNEY W. ANDERSEN, LLOYD E. HALL, BERNARD B. CROSS, Defendants in Error.	ERROR TO CIRCUIT COURT, COOK COUNTY.

Opinion filed Jan. 18, 1928.

MR. JUSTICE WILSON delivered the opinion of the court.

This cause comes before us on a writ of error to the Circuit Court of Cook County. A motion here to dismiss the writ of error was filed by the defendant Sidney W. Andersen, on the ground that the bill of exceptions was defective in that it was the original bill of exceptions filed in said cause and was incorporated in and made a part of the record without a stipulation or agreement of counsel; and that the bill of exceptions was filed May 18, 1926, and was not signed or sealed by the court at that time but was marked "presented and signed" February 24, 1927, which was more than a year after the time within which the bill of exceptions should have been signed, sealed and filed.

The abstract of record filed in this cause contains no placita, nor reference to any of the orders entered in said cause, and for that reason this court has to resort to the original record filed herein.

The record shows that a judgment on the verdict

was entered in the cause on July 17, 1925; that an appeal was prayed and allowed on that date on the filing of a bond in the sum of $100 within 30 days and a bill of exceptions within sixty; that the time for filing a bill of exceptions expired November 6, 1925; that the so-called bill of exceptions was filed May 10, 1926; that the said record was presented to the trial judge on February 24, 1927 and by him marked "presented February 24, 1927"; and that on February 25 a certificate was signed by the trial judge, to the effect that the bill of exceptions contained all the evidence and proceedings had and taken in said trial, except the instructions to the jury. There is nothing in the record to show that this order was entered nunc pro tunc, and there is nothing in the record upon which any nunc pro tunc order could have been entered. Instructions, or what purport to be the instructions in said cause are included in the common law record and not in the bill of exceptions.

The ground for reversal in this court is based solely on the question of the weight of the evidence, and the brief contains the testimony of the various witnesses, set out in extenso.

Counsel for plaintiff in error cites two or three cases on the general proposition that the giving of certain instructions was error, but in no way calls the attention of this court to the particular instructions claimed to be erroneous, nor are the instructions set out in the brief by reference or otherwise. This court is referred to the record as the place where it could find the instructions.

The motion of the defendant in error, to strike

the bill of exceptions from the record, is allowed for the reason that it appears to be the original bill of exceptions and there is no stipulation or agreement that it should be incorporated in the record in lieu of a copy and for the further reason that the court had lost jurisdiction to sign, seal and settle said bill of exceptions.

The bill of exceptions having been stricken from the record and no exception having been predicated upon the common law record itself, there is no error which this court can consider, and for that reason the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

183 - 31794

PEOPLE OF THE STATE OF ILLINOIS, ex rel, EDITH HOORATH, Appellee	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
FRANK LAPREL, Appellant.	

Opinion filed Jan. 18, 1928.

MR. JUSTICE WILSON delivered the opinion of the court.

This is an appeal from a judgment of the Municipal Court of Chicago, finding that one Edith Hoorath was on the 10th day of May delivered of a bastard child, born alive, and that the defendant is the father of said child.

The relatrix, Edith Hoorath, testified that she was 33 years of age, and that she first knew the defendant, Frank Laprel, on or about the latter part of July, 1925; that she had sexual intercourse with him on August 2, 1925, at the Stratford Hotel in Chicago; and that at the time she met the defendant in July she was going under the name of Howard, which she used as a matter of convenience. Her introduction to LaPrel was of the most informal kind, it appearing that she was walking on Michigan avenue, and appeared to be limping, when she met the defendant, who asked her what was the matter with her and, as she seemed to be in distress, he took her home in a cab. At another time she called him up on the telephone

and he met her on the street and took her home on a bus but did not go into the house. The third time they met, they appear to have spent the afternoon together and had dinner that night. They stood in front of the house where she was rooming for a little time on this occasion and then went to the Stratford Hotel, where they called on a friend of the defendant, whose name was James Dineen, who, together with a man named Hendritze - both witnesses in this cause, occupied adjoining rooms which were connected by a bathroom. The relatrix and the defendant remained there for a half hour or an hour, and Dineen and Hendritze both testified that during this entire time the bathroom between the two rooms was open, and they passed back and forth; that they had the victrola going, and that at no time was there any sexual intercourse between the relatrix and the defendant. These two witnesses are uncontradicted in their testimony. There is nothing in the record which would indicate that they were persons who were in any way interested in the outcome of the suit, nor of a character that would cause discredit to be cast upon their testimony.

There was further testimony by a witness named Daniel Dasher, to the effect that on August 15, 1925, he had sexual intercourse with the relatrix, at the Forest Preserve; and a witness named Lester Lewis testified that on or about August 22, 1925, he also had sexual intercourse with the relatrix, at 5521 Winthrop avenue. This witness further testified to a certain physical defect of the relatrix, which would be discoverable only under circumstances of the utmost intimacy, and which fact does not appear to

have been denied in the testimony of the relatrix. A witness by the name of Bernie Beck, who roomed at the same house in which the relatrix lived, testified that on the night of August 30, 1925, at or about 11:30 P.M. she saw a man by the name of Buerkel enter her room, and was told by the relatrix the next day that she had had "a party" and had intercourse with Buerkel on that occasion.

The rule in this state is that a conviction in a case of this character may be had on the uncorroborated testimony of the prosecutrix, and there is an old saying that if anybody should know - the mother of the child should know, who the father of the child is; yet it may be that the prosecutrix may not always state the truth, and there is no reason why well known rules of evidence should be disregarded in prosecutions of this kind. Courts do not favor testimony of witnesses who testify to having had sexual intercourse with a woman, and this kind and character of testimony is repugnant to courts and juries; but, the undisputed facts in this case show and it is not disputed that there was only one act of intimacy between herself and the defendant, and she places that at the Stratford Hotel when two persons were present whose testimony, in contradiction to hers, has not been successfully attacked in any way. This coupled with the testimony of the defendant, who denies that he had sexual intercourse with her, and coupled with the fact that he had known her but a period of two or three weeks; the circumstances under which he met her, the fact that she was going under an assumed name; and, giving the testimony of Dasher and Lewis but very little weight, never-

have been denied in the testimony of the witness.

Witness by the name of [illegible], was present at the scene in which the [illegible] lived, testified that on the night of August 24, 1[illegible], he or she saw [illegible] a man by the name of [illegible] enter her room, and the said by the testimony the more so that the [illegible] and had intercourse with [illegible] against her consent.

The rule is only right in that a verdicts in a case of this character may be had on the uncorroborated testimony of the prosecutrix, but this is an old saying that is anybody should know - the testimony of the child should know, who the father of the child is, but it may be that the prosecutrix may not always state the truth, and there is no reason why will from motive of revenge should be disregarded in prosecution of this kind. Purely do not from business of whatever who testify to having had sexual intercourse with a woman, and this fact has bearing of testimony in argument to counts [illegible] but, the was disposed there is still more than one is in the [illegible] that there was only one act of intercourse between herself and the defendant, but she stated that [illegible] two persons were present when [illegible] to have, but not been successfully [illegible] to say so. This coupled with the evidence of the [illegible], the [illegible] shall be had sexual intercourse with her, and coupled with the fact that he had [illegible] but a period of [illegible] money, the circumstances [illegible] the [illegible] that he was [illegible] testimony of [illegible] that [illegible]

theless, this court feels that the decided weight of the testimony is in favor of the defendant.

The Supreme Court of this State, in the case of Jones v. People, 53 Ill. 366, in its opinion at page 368 says:

> "On the point that a new trial should have been awarded, on the ground that the verdict is against the weight of the evidence, we have to say, we have examined all the testimony in the record, and are satisfied it greatly preponderates in favor of the defendant.
>
> Though the mother of a child is most likely to know who its father is - by whom it was begotten - yet she may not always state the truth. In this case, the putative father testifies he never had sexual intercourse with the complainant, and that he is not the father of the child; and other witnesses, who were not impeached, and who seem to be of unquestioned credibility, testify to facts contradictory of those stated by her, and while she is not corroborated in any important particular by any witness, we think the verdict should have been for the defendant. The case should go to another jury, and that it may, this judgment is reversed and the cause remanded."

It may be argued that the court who tried the issues saw the witnesses, but there is nothing in the record, as we have said, which would cause this court to scrutinize the testimony of Dineen and Hendritze more closely than the testimony of any other witness would be scrutinized in any other proceeding.

We feel that this cause should be re-tried, and for that reason and the reasons expressed in this opinion, the judgment of the Municipal Court is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

315 - 31836

WILSON AVENUE BATHING BEACH COMPANY, a corporation, for the use of JOSIE M. LYDSTON, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
NORTH BRITISH & MERCANTILE INSURANCE COMPANY, Ltd., a corporation, Appellant.	

Opinion filed Jan. 18, 1928.

MR. JUSTICE WILSON delivered the opinion of the court.

This is an appeal from a judgment for $1,000, entered in the Municipal Court of Chicago, in favor of the Wilson Avenue Bathing Beach Company, for the use of Josie M. Lydston, and against the North British & Mercantile Insurance Company, Ltd., a corporation, as garnishee. Very briefly the facts disclose that the Wilson Avenue Bathing Beach Company had taken out an insurance policy with the defendant company, covering it from May 1, 1925, to May 1, 1926, against loss or damage by fire. The policy contained an average clause reading: "This policy to attach on each building in proportion as the value of each bears to the value of all." It appears from the testimony that there were three buildings on the premises in question, which were supposed to be covered with insurance under the average clause in the policy with the defendant company. The policy also contained a clause to the effect that if there was any change in the interest, title or possession of the insured; or if the interest of the insurer be other

than unconditional and sole ownership, then this policy should be void. It was further provided that sworn proof of loss should be rendered within sixty days; and that no suit should be instituted until such proof had been made.

It appears from the testimony that the Wilson Avenue Bathing Beach Company, had originally leased the premises in question from one Lincoln T. Neafield, under a lease dated January 11, 1923; and that said lease was assigned to Josie M. Lydston on March 30, 1912. On October 31, 1924, a lease was entered into by and between Josie M. Lydston and the Wilson Avenue Bathing Beach Company, by which said Josie M. Lydston leased the premises in question to the Bathing Beach Company until the 31st day of December 1926. It further appears that the Bathing Beach Company had had an unsuccessful season in the years 1924 and 1925, and there seems to have been some conflict in the testimony as to whether or not the lease had been turned back to the said Josie M. Lydston, so that she might have an opportunity to sell said property or lease it during the winter months of 1925 and 1926, because the lessee had been unable to pay the rental. There appears, moreover, to have been a conflict in the testimony as to whether or not proper proof of loss or any proof of loss had been made by the lessee; and a further question as to the extent of the damages caused by the fire.

Said Josie M. Lydston recovered a judgment against the Wilson Avenue Bathing Beach Co. for the sum

of $3,424.23 and costs; and upon an execution being returned "no property found", this action was brought against the defendant below, the Insurance Company, as garnishee, to recover the amount of the policy issued by the defendant covering the buildings of the Wilson Avenue Bathing Beach Co., located on the property owned by the lessor, Josie N. Lydston. At the end of the plaintiff's testimony the defendant moved the court to direct a verdict in its favor.

The testimony shows that the claim against the garnishee was a contingent and unliquidated claim, and in the view this court has taken of such claims, it did not come within the purview or meaning of the Statute on Garnishments. This court held in the case of Shraiberg Mfg. Co. v. for use of Robert Bachrach v. Boston Insurance Company of Boston, Massachusetts, Vol. 246, page 186, Illinois Appellate Reports, that a garnishment proceeding would not lie against an insurance company on a policy of insurance, for a loss by fire, where the amount was contested and where there was a denial of the fulfillment of the conditions of the policy by the insured. This court there said:

> "It appears that whatever the general rule may be or whatever the rule may be with reference to particular statutes in other States, the law in this State is clear that a garnishee proceeding will not lie where the claim is contingent or unliquidated or is not ascertainable by computation except by a verdict of a jury, * * *"

For the reasons stated in this opinion, the rule announced in the Shraiberg case, supra, will be adhered to and the judgment of the Municipal Court in the case at

bar will be reversed, and the cause remanded with directions to dismiss said garnishment proceedings on the answers filed by the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

TAYLOR, P.J. AND HOLDEN, J. CONCUR.

247 I.A. 627

304 - 31915

ISAAC S. STERN, Appellant, v. O. C. GRAFF, ET AL, Appellees.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

Opinion filed Jan. 18, 1928.

MR. JUSTICE WILSON delivered the opinion of the court.

From the facts in this case it appears that the Graff Motor Coach Co., a corporation, was doing business in the City of Chicago, and that one O. C. Graff was the General Manager of the company and one Walter T. Graff was the president. On November 20, 1923, the said Walter T. Graff, defendant herein, entered into an agreement with one Oliver & Co., for the purchase of real estate located in Chicago. It further appears that he was unable to finance the purchase of said property, and for that reason entered into a contract with one Joseph B. Greenwald, under date of January 7, 1924, by which, in consideration of $7,000 cash to be paid by the first party to the second party in said agreement, the said second party agreed to consummate the terms of the contract and construct a building upon said premises, pursuant to plans and specifications to be approved by the Graff Motor Coach Co., which is also a defendant in this cause. The contract further provided for the amount of rental to be paid for said building; and that the

304 - 31232

ISAIAH S. [illegible],

[illegible],

v.

O. S. [illegible], [illegible].

[illegible].

[illegible]

[illegible]

[illegible].

Opinion filed Jan. 18, 1932.

[illegible]

the court.

From the facts in this case it appears that the Shell Motor Car Co., a corporation, was doing business in the city of Decatur, and that one S. S. Shell was the general manager of the company and one Walter A. Shell was the president. On October 4th, 1928, the said Walter A. Shell, defendant herein, entered into an agreement with one Oliver A. Ge. for the purchase of real estate and fixtures in Decatur. It further appears that he was unable to finance the purchase of said property, and for that reason entered into a contract with [illegible] L. [illegible], under date of January 7, 1929, by which, in consideration of $[illegible] cash to be paid by the first party to the second party at said agreement, the said [illegible] agreed to assume the terms of the contract and contract in building upon said premises, necessary to clear and equalizations to be approved by the Shell Motor Car Co., which is also a defendant in this cause. The contract further provided for the amount of money to be paid for said building and that the

obligation of the second party to the contract to construct such building was conditioned and dependent upon the ability of the second party and the Graff Motor Coach Co. to agree upon the terms and conditions of said lease, and upon the latter executing the same. The agreement further provided that if the parties were unable to agree upon the terms of the lease, said Motor Coach Co. might have an option to purchase said property from said Greenwald, within a certain time specified in said agreement.

It appears from the testimony that prior to the date of this agreement, and, as a matter of fact, on December 14, 1923, Greenwald purchased the property in question, evidently in pursuance of the plan outlined in the contract of January 7; the agreement which was subsequently entered into between the parties Graff and Greenwald. On December 15,1923, Greenwald entered into a verbal contract with the complainant below, Isaac S. Stern, under which contract and agreement, the said Stern agreed to prepare plans and specifications for a building to be erected on the premises in question, suitable for the use and purposes of the Graff Motor Coach Co. It appears from the testimony that O.C. Graff, one of the defendants herein, examined the plans and talked with Stern concerning them and also about negotiating a mortgage on the property. On February 29, 1924, Greenwald conveyed this property to Walter W. Graff, and the deed was recorded March 3, 1924. Thereupon Graff procured a new firm of architects by the name of Bowman, Littleton & Co., and this firm prepared the plans for the building which was afterward erected upon the premises by the defendant Graff Motor Coach Co., in

accordance with said Bowman, Littleton & Company's plans.

It nowhere appears in the record that the plans used in the erection of the building by the defendant Motor Coach Company were the plans prepared by Stern, complainant below. The plans prepared by Stern & Co. were completed before the signing of the contract of January 7, 1924, between Walter W. Graff and Joseph B. Greenwald.

The facts further show that on June 18, 1924, a claim for lien was filed by complainant with the clerk of the Circuit Court of Cook County, verified by affidavit as provided by statute. This action is predicated upon the fact that the building was to have been erected by Greenwald for the use and benefit of the Graff Motor Coach Co., D.G. Graff and Walter W. Graff; and that by reason of the services rendered, complainant became and was entitled to a lien upon said property for work and labor performed, which was a benefit to the property and by reason of which the property became subject to a lien, and the defendants liable by reason of their employment of the complainant and the use of his plans and specifications. There is nothing in the abstract of record filed herein, showing that the lien notice contained the necessary allegations to constitute a valid and binding lien under and by virtue of the Mechanic's Lien Act. The lien does not state when the last work was done nor that it was done at the request of the defendants, nor, in the absence of their request, then, with their knowledge and consent. Neith is there any allegation that the work enhanced the value of the property.

The sole question for our consideration appears to be whether or not the defendants, by their conduct, undertook to become liable for the plans and specifications prepared by the complainant. The facts clearly show the original work was ordered and prepared at the request of Greenwald - at that time the owner of the property; that the building was to be erected by him and that it was to be rented to the defendant Graff Motor Coach Co. Such conversations and communications as the Motor Coach Company may have had with Stern, in regard to said building, were only those which a tenant would naturally have concerning a building which was to be erected for their use and which would be adaptable for their purposes. We have been unable to find anything in the testimony which would show that they had undertaken to assume the liability incurred by Greenwald for plans and specifications prepared by the complainant.

The learned trial judge, after hearing the case and seeing the witnesses, appeared to take this view of the situation and at the hearing the bill was dismissed for want of equity. In this finding the court concurs.

For the reasons stated in this opinion, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND HOLCOMB, J. CONCUR.

317 - 31930

247 I.A. 628

HARRY BUCKLEY, Appellee;	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
v.	
EDGEWATER BEACH HOTEL COMPANY, ET AL., Defendants,	
ON APPEAL OF JAMES McALVANY, Appellant.	

Opinion filed Jan. 18, 1928.

MR. JUSTICE WILSON delivered the opinion of the court.

This cause comes to this court on an appeal from the Circuit Court of Cook County, and was consolidated with the case of Buckley v. Edgewater Beach Hotel, et al - on appeal of Edgewater Beach Hotel Company - General No. 31929, in which case we are this day filing an opinion, and is governed and controlled by the decision in that case.

For the reasons expressed in the opinion in that case, the judgment of the Circuit Court will be reversed, and the cause remanded.

REVERSED AND REMANDED.

HOLDOM, J. CONCURS;
TAYLOR, P.J. DISSENTING for reasons set forth in opinion filed herewith today in case No. 31929.

29 - 31948

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel, CHARLES SCRIBNER EATON, Defendants in Error,	ERROR TO SUPERIOR COURT, COOK COUNTY.
v.	
EDMUND K. JARECKI, County Judge, et al,	
LEONARD J. GROSSMAN, Plaintiff in Error.	

Opinion filed Jan. 28, 1928.

MR. JUSTICE WILSON delivered the opinion of the court.

This matter comes before this court on a writ of error sued out by Leonard J. Grossman, plaintiff in error, to correct an order of the trial court awarding the writ of mandamus as prayed for in a certain petition filed therein, in which it appears that one Charles Scribner Eaton was the relator and Edmund K. Jarecki, county judge, and certain election officials were defendants. Plaintiff in error was not a party to the proceeding in the trial court but perfected this appeal by reason of his claimed interest in the proceeding, and, in the opinion of this court, his interest is such as to entitle him to appear in this proceeding, in relation thereto, as plaintiff in error.

The petition in said cause recites that an election for alderman was held in the city of Chicago and that the relator Charles Scribner Eaton and Leonard J. Grossman were the only candidates whose names appeared upon the official

aldermanic ballot in the 5th ward of said city. The election was held on February 28, 1927. It was held under the so-called non-partisan election act, as alleged in said petition. The act provides that in the event a candidate for alderman in any ward fails to obtain a majority of the total number of votes cast for that office, there shall be a so-called supplementary election, which is to be held on the first Tuesday of the following April. The petition further avers that the canvassing board of the city of Chicago, consisting of Edmund J. Jarecki, County Judge; Francis A. Busch, City Attorney; Fred V. McGuire; Harry A. Lipsky and Frank W. Barber - Election Commissioners - duly opened the returns and tabulated and canvassed the same and ascertained the result of said election and entered of record its findings; that as a result of that tabulation there appeared that a total of 15,358 votes were cast in the Fifth Ward at said election and that of this number the relator obtained 7,400 and plaintiff in error 7,501, leaving a balance of 457 votes cast but not counted for any candidate.

In the view this court takes of this action, it becomes unnecessary to discuss the rights of the trial court to direct by mandamus a retabulation of the returns of the canvassing board or to consider the question as to whether or not the 457 votes, referred to as cast, should be considered, there being no allegation that they were valid or susceptible of being counted; nor is it necessary for this court to consider that the proper tribunal to pass upon this election would be the City Council. It appears from the facts in evidence that the prayer of the petition is that the canvassing

board be compelled to call a special election, pursuant to the statute, on April 5, 1927, for the purpose of affording relator an opportunity to again run at a supplementary aldermanic election to be held on that date by virtue of the provisions of the statute that requires such an election where no candidate has received a majority of the total votes cast.

The time for such an election has long since passed. The relator in the mandamus proceeding in the trial court and parties defendant therein have failed to follow this appeal. No good purpose would be subserved by reason of the issuance of such a writ. Our Supreme Court in the case of People v. City of Streator, 258 Ill. 271, in its opinion at page 274 says:

> "The rule has long been recognized in this court that the writ of mandamus will not be issued in any case where it will prove unavailing, fruitless or nugatory; that the court will not compel the doing of a vain and useless thing."

This court in the case of The People v. Buck, 181 Ill. App. 110 in its opinion on page 112, says,

> "If this court should affirm this order and judgment of the circuit court, it is not in the power of the court to enforce the judgment, that is, to compel the respondents to hold an election on the third Tuesday of July, 1912."
>
> "It is the settled rule of law, as applied in cases of mandamus, that courts will not award this peremptory writ where the right sought to be enforced has become a mere abstract right, the enforcement of which the court can see would be impossible, since no substantial or practical benefit could result to the petitioner."
>
> "In the case of the People v. Kay, 154 Ill. App. 233, in discussing this subject, the court said: 'The prayer of the petition only relates to the election to be held on April 20, 1909. That period has passed. No mandamus can now issue to call that

election in any particular manner. It is well settled that a peremptory writ of mandamus will not be awarded when the right sought to be enforced is an abstract right, the enforcement of which by some change of circumstances since the commencement of the suit can be of no substantial or practical benefit to the petitioners.'"

For the reasons expressed in this opinion, the judgment of the Superior Court will be reversed and judgment will be entered here, dismissing the petition.

JUDGMENT REVERSED AND JUDGMENT HERE.

TAYLOR, P.J. AND HOLDEN, J. CONCUR.

310 - 31921

247 I.A. 628

WINIFRED FINK as Administratrix of the Estate of WILLIM FINK, Deceased, Appellee, vs. YELLOW CAB COMPANY, Appellant.	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of $6000 in an action tried before a jury to recover for loss sustained by reason of the death of William Fink as the result of injuries received in a collision between two automobiles at California and Diversey avenues, Chicago, on February 16, 1923.

Deceased, who hereafter will be referred to as plaintiff, was driving a Diamond cab southward on California avenue with a passenger named Conroyd. A Yellow cab was going westward on Diversey avenue and they collided at the street intersection. A suit to recover damages on account of the death of Conroyd, the passenger in the Diamond cab, has been before this court twice. 239 Ill. App. 663, and again in Appellate Court opinion No. 31587, filed October 10, 1927.

As there must be another trial we refer only briefly to the facts. There is a fire engine house on the southwest corner of Fairfield and Diversey avenues, which is one block east of California avenue. A fireman and a city policeman were in the engine house. The fireman was looking out of the window on Diversey avenue and noticed a Yellow cab going west on Diversey at a speed which he estimated at 35 miles an hour. It passed out of his view about 65 feet east of California avenue; about two seconds thereafter he heard a loud crash; both he and the policeman went out of the door and saw

two cabs at Diversey and California avenues. He had been at the window about a minute before the Yellow cab passed and had not seen any other vehicle pass during that time.

The policeman went to the scene of the accident and saw that a Diamond cab and a Yellow cab had collided; the Yellow cab driver was standing on the street. The policeman, with the assistance of the Yellow cab driver, got Conroyd, the passenger, out of the Diamond cab and he was taken in a street car to the police station. A man named McDermott got off the street car and helped to carry Conroyd. McDermott remained at the scene of the accident and found William Fink lying under the left back wheel of the Yellow cab; this was raised with a jack and Fink was taken out and to the hospital.

It is claimed as a defence that both the Diamond Cab Company and the Yellow Cab Company owned and operated the respective cabs in question, that they were under the Workmen's Compensation act and that plaintiff's death arose out of his employment. It is said there was evidence tending to support this, but that the court committed reversible error in instructing the jury that as a matter of law the Workmen's Compensation act had no application to this case. If these facts, as claimed by the defendant, were established to the satisfaction of the jury, then under the Workmen's Compensation act plaintiff had no cause of action against the defendant under the so-called Injuries act. Keegan v. C. B. & Q. Traction Co., 277 Ill. 413; Friebel v. C. C. Ry. Co., 240 Ill. 76; Schlitz Brewing Co. v. Chicago Rys. Co., 307 Ill. 328.

If there was any evidence which, standing alone and with its legitimate inferences, tended to establish the existence of these facts, then it was a question for the jury and not for the court to find, in the first instance, whether such facts had been established. The credibility of the witnesses, the weight of the testimony, the

drawing of inferences from facts proved, are all questions of fact to be decided, in the first instance, by the jury, not by the court. McGregor v. Reid, Murdock & Co., 178 Ill. 464; Deving v. Delano, 272 Ill. 166.

There was testimony that Conroyd started for his home as a passenger in a Diamond cab; that the Diamond cab in question had been operated out of the garage of the Diamond Cab Company for three or four years. There was testimony as to the earnings of Diamond cabs and that they were used in making trips with passengers for fare. It was alleged in the declaration that the Yellow cab in question was a taxicab designed and used for carrying passengers and was operated by the Yellow Cab Company, and this seems to be conceded.

John C. Elliott testified that the Diamond Cab in question belonged to him; that there were about four hundred Diamond cabs in operation in Chicago which bore the name of the Diamond Cab Company in large letters and had the same markings, but about twenty to sixty belonged to the Diamond Cab Company and the rest belonged to individuals. There was evidence that the Diamond Cab Company washed and cared for all these cabs in its garages and looked after the insurance and licenses and took orders from customers; that the company had a garage at 35th and State streets and another on Clybourn avenue. Elliott testified that the cab in question had the regular Diamond cab design on the car and the Diamond markings and colorings all around the sides and rear of the cab; these were the regular colors of the Diamond Cab Company and the emblem was the regular one that appeared on all the doors of the cabs of the Diamond Cab Company. The number of the cab in question is the taxi-stand license number of the Diamond Cab Company, and this number corresponds with the license that is issued to it by the city. Every cab also has a state license, which is issued on application signed and sworn to and filed with the Secretary of

State. Elliott testified that no state license was ever issued to him; that he had purchased this cab about six months prior to the accident and operated it under an arrangement with the Diamond Cab Company as to garage service, cab stand and insurance. He operated the cab until the evening before the accident, when he put the cab in the Diamond Cab Company's garage at 39th and State streets; he then made an arrangement to permit Fink to operate the car and gave orders to the superintendent of the Diamond Cab Company to permit Fink to take out the cab.

The defendant offered in evidence what purported to be a certificate with reference to the state license number of the Diamond cab in question, giving serial numbers and engine and motor numbers and the sworn application for a state license, in which the name of the owner is given as "Diamond Cab Company, J. J. Callahan, Secretary." Objection to this was sustained. This ruling was reversible error. Any acts of ownership and conduct on the part of the Diamond Cab Company which tended to show ownership were competent. It is true that it does not necessarily follow that the party who made the application for a license is the owner of the vehicle, but it is some evidence of that fact. The court should have permitted this certificate or application to go into evidence.

The court also improperly sustained an objection to a question put to the widow of William Fink, touching prior evidence she had given at the coroner's inquest to the effect that William Fink was employed by the Diamond Cab Company.

In E. St. L. C. Ry. Co. v. Gilman, [illegible] Ill. 114, it was held that the fact that the engine, which caused the injury, bore the name of defendant company was sufficient evidence of ownership to let that question go to the jury. In Foreman Trust & Savings Bank v. Yellow Cab Co., 242 Ill. App. 648, it was held that the color and markings on the cabs of the Yellow Cab Company made out a *prima facie* case of ownership in the defendant company. In

Rheude v. Chicago Daily News Co., 290 Ill. App. 618, it was held that the name "Chicago Daily News" printed on the wagon was sufficient evidence to make out a prima facie case of ownership.

It is argued by plaintiff's counsel that, since the defendant invokes the Workmen's Compensation act as a defense, it had the burden of proving that Fink was an employee of the Diamond Cab Company. This may be conceded, but this involves a consideration of the weight and sufficiency of the evidence. Although Elliott testified that he owned the cab and that Fink drove the same under some arrangement with him, there was some evidence tending to impeach this. Elliott claimed that he bought the cab from a man in the Ashland block and had owned it some five or six months before the accident, and that it had not been used as a Diamond cab before he bought it; while Kirkland, the superintendent of the Diamond Cab Company, testified that Elliott had owned it for three or four years and that it had been used as a Diamond Cab Company cab during all that time, with its name and trademark on it. The jury should have been permitted to consider this discrepancy, together with all the other evidence in the case, and to draw its own conclusion as to whether or not at the time of the accident the cab in question was owned by the Diamond Cab Company and whether or not Fink was its employee.

The giving of the instruction that the Workmen's Compensation act had no application was reversible error.

It is next argued that the allegations of the fourth count are not sufficient to state a cause of action for wanton and wilful injury, and that there is no evidence upon which the jury could reasonably find that the driver of the defendant company wilfully and wantonly injured plaintiff. We hold that both of these points are good. The fourth count is that the defendant unlawfully, wilfully and wantonly and contrary to her statute refused and neglect-

ed to so slacken his speed or to stop and thus give the right of way over said crossing to the other vehicle, but on the contrary unlawfully, wilfully and wantonly undertook to drive his taxicab over said street intersection, and in so doing wantonly and wilfully drove at a greater speed than was reasonably safe and proper. To say that a driver wilfully (which is the same as wantonly) drives an automobile is not the same as charging wilful infliction of injury. To deprive a defendant of the defense of contributory negligence of the plaintiff, the declaration should charge in definite terms the wilful infliction of injury. Harris v. Piggly Wiggly Sharpe, Inc., 236 Ill. App. 302; Kwasniak v. Oretch, 248 Ill. App. 438.

There was no evidence of wilful and wanton infliction of an injury by defendant's driver upon the plaintiff. The record contains no evidence of any eye-witness to the accident. When last seen before the collision by any witness in this record, the Yellow cab was about sixty-five feet east of California avenue. There was no direct evidence as to the conduct of the driver of the Yellow cab thereafter. Ken nonetat he may have done his utmost to avoid the collision. It would tend to work injustice to permit the jury to conclude that an injury was wilfully and wantonly inflicted where there is no evidence of an eye-witness, thus leaving this vital question to be determined by surmise and conjecture. The court improperly submitted this count to the jury and improperly refused to give defendant's submitted instructions touching contributory negligence of the plaintiff.

As we have said in previous opinions concerning this accident, it is for the jury under proper instructions to determine which of the two vehicles was entitled to the right of way and that this would depend upon the speed of the respective cabs, the direction in which they were going, and their respective distances from the street intersection.

Instruction No. 7 in general terms, although loosely,

states the duty of the driver when approaching and crossing an intersection towards another approaching from the right. The instruction would be improved by adding at the end the words, "if reasonably possible to avoid such collision."

Instruction No. 8 is criticized because it contains the statutory provision that a certain rate of speed in excess of the statutory rate "shall be prima facie evidence that the person operating such motor vehicle is running at a rate of speed greater than is reasonable and proper." We have criticized the giving of such an instruction in Harris v. Piggly Wiggly Stores, Inc., 224 Ill. App. 392. It seems a sound rule that what constitutes prima facie evidence is a rule of law for the guidance of the court and not a rule in the law of evidence to be given to the jury. We would not be understood as holding that in every case the use of the words "prima facie" in an instruction should work reversible error, but in cases like the instant case we are inclined to hold that these words standing alone and unexplained in an instruction tend to mislead the jury and that the giving of such an instruction is reversible error.

For the reasons above indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., concurs.

O'Connor, J., specially concurring:

I do not agree with what is said on the question as to the wilful and wanton infliction of the injuries. On this question my view may be found in Williams v. Kaplan, 242 Ill. App. 164. In my opinion instruction No. 7 was wrong. See Heidler Hardwood Lumber Co. v. Wilson & Bennett Mfg. Co., 242 Ill. App. 39, and cases there cited.

51 - 31986

247 I.A. 628

MAUD C. COVILLE, Administratrix of the Estate of Walter F. Coville, Deceased,

Appellee,

vs.

GRAND TRUNK WESTERN RAILWAY COMPANY, a Corporation,

Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

The administratrix of the estate of Walter F. Coville, deceased, brought suit under the Federal Employers Liability Act to recover damages for the death of Coville, an employee of the defendant, and upon trial had a verdict of the jury for $35,000. From the judgment thereon defendant appeals.

Walter F. Coville, who hereafter will be called plaintiff, was on June 6, 1926, a yard conductor employed by the defendant in what is known as its 47th street yard in the city of Chicago. On that date, while riding upon the side of a freight car which was passing through a switch, he was crushed between it and another car standing on a nearby track. From the injuries received he subsequently died.

The declaration in a number of counts alleged that the defendant was a common carrier by railroad engaged in interstate commerce; that in such commerce it was using tracks in its yard in Chicago for switching and movement of cars; that plaintiff was employed in interstate commerce as yard conductor, assisting in the movement of certain interstate cars; that defendant negligently operated and controlled its cars and locomotives so that they ran so near to a track upon which other cars were standing that plaintiff was knocked from the car upon which he was riding and so injured that he died. The declaration alleges pecuniary dam-

sought for plaintiff's pain and suffering. It was alleged that the accident was caused by the negligent conduct of defendant in opening a cross-switch, by reason whereof the car on which plaintiff was riding ran close to other cars.

Defendant is a common carrier by railroad engaged in both interstate and intrastate commerce. The three tracks in the 17th street yard concerned in this accident extend north and south. The most easterly track is known as the "long" track; the second track from the east as the "wash" track; and the third track from the east as the "house" track. To the west of these three are other tracks leading to freight houses. At a point on the wash track, a little south of where 13th street would cross if extended, there is a switch running northeasterly to the long track. About 75 feet north of this switch is another switch leading northwesterly from the wash track to the house track.

At the time of the accident freight cars were being moved by a switching crew consisting of the plaintiff, Frank Welsh, a brakeman, Lawrence Clements, an engineer, and Frank Moser, a fireman. There was another switchman, Thomas F. Mahoney; there is some controversy as to just what he did immediately prior to the accident.

On the afternoon of the day of the accident this crew went to work at three o'clock. The work consisted in coupling an engine onto the cars on the tracks west of the wash track and pulling and pushing them onto other tracks or placing them in different positions on the wash track. They were not making up a train. None of these movements were between the wash track and the long track. The switching engine was headed north. About 4:15 p. m. the engine moved off the house track southward through the north switch onto the wash track and toward 14th street, passing

the point of the switch leading from the wash track to the long track near 13th street. Several minutes later the engine moved north upon the wash track and plaintiff coupled it to a car standing on that track, and then the engine and car moved a few feet further north on the wash track and plaintiff coupled the car to the south end of Grand Trunk car No. 18339, which was standing several feet south of the point of the switch leading to the long track. Plaintiff mounted this Grand Trunk car at its northeast corner and signaled the engineer to proceed north. The two cars pushed by the engine moved slowly north. It was the intention to move these cars further north on the wash track, but through some mistake the switch from the wash track to the long track was open and the Grand Trunk car moved slowly over this switch towards a string of cars that were standing on the long track. The engineer saw that this car was taking the switch and stopped his engine when the car had reached a point about one foot from a car standing on the long track. Plaintiff's body struck the door frame of the standing car and received the injuries which caused his death.

It is not disputed that in order for plaintiff to receive the benefits of the Federal Employers Liability Act, the defendant and the plaintiff both must be engaged in interstate commerce by railroad when the accident occurred, or in work so closely connected with interstate commerce as to be substantially a part of it. The controlling question is whether Grand Trunk car No. 18339, on which plaintiff was riding when injured, was at that time engaged in interstate or intrastate commerce.

The burden of proof that at the time of an injury one is engaged in interstate commerce so as to render applicable the Federal Employers Liability Act rests upon the plaintiff. Farmers T. & S. Bank v. G. T. R. Ry. Co., 248 Ill. App. 428; C. & A. R.R.

Co. v. Industrial Com., 290 Ill. 499. From a consideration of the record, we hold that the plaintiff has not sufficiently met this requirement.

Car No. 18339 came into the 12th street yard on the day of the accident loaded with two consignments of freight that had come from Canada. These were interstate shipments. One was of iron, the other of household goods. The household goods were unloaded from the car about two hours before the accident happened. There is dispute as to when the iron was unloaded, the defendant claiming that it was unloaded at about the same time as the household goods, and the plaintiff claiming that it was still in the car at the time of the accident. The evidence concerning this fact is uncertain.

The iron was consigned to Chicago, Illinois, Massey Concrete Products Corp., c/o Landon Cartage Company, Clearing, Illinois. To reach Clearing it would be necessary for the car to be delivered by the defendant to the Belt Railway. Plaintiff argues that because the car had not been moved by the way of the Belt Railway, it still contained the interstate shipment of iron. As against this the defendant shows that the car came into the Bladon yard at 51st street; that the point at which the Grand Trunk delivers cars to the Belt Railway is at Hayford, Illinois, near 71st street, and that if it had been intended to transfer the car to the Belt Line, it would have gone from the 51st or Bladon yard southward to the Belt Railway at 71st street, whereas it passed both Hayford and Bladon and was taken northward to the 12th street yard. The incoming train sheet record tends to show that the iron was unloaded from this car at the 12th street yard at 3:40 p. m. daylight savings time, which would be 2:40 p. m. standard time, on June 6th, the day of the accident, and delivered to the Landon Cartage Company. This tended to show that the car

was completely unloaded about two hours before the accident in question, so that at the time of the accident it was an empty car. At this time its next movement was not determined. The day following the accident was Sunday, and defendant had no force working in the 18th street yard on Sunday. The record shows that the car in question left the Bladen yard June 9, 1925, at six o'clock a. m., with a shipment for Oak Glen, Illinois, in a train with cars containing interstate shipments.

There is some confusion in the testimony of Clements, the engineer. At one time he states that, to the best of his recollection, the car was loaded at the time of the accident, and at another he says that it was unloaded. He testified: "I was told that this car was loaded. There is no way at all to tell whether *** one of them is loaded or empty."

A subpoena duces tecum was served on the defendant to produce the switch sheet or other documents showing the movement of car No. 18389 on June 6th. The subpoena is not in the record, so that we do not know exactly what it called for. It appears to have been served on the defendant about five o'clock before the day when the testimony of the particular witness who had these records in charge was taken. There was evidence that there had been a fire in defendant's office which had partly destroyed and disorganized its records. There is an intimation that if defendant had been given sufficient time, it could have produced more records, including the switch sheet showing the purpose of the movements of car No. 18389. It also should have been an easy matter to have produced evidence from the Landon Cartage Company, to whom the shipment of iron is claimed to have been delivered, and also from the Massey Concrete Products Corp. The testimony of either or both of these concerns should have

established beyond any doubt whether or not the car was unloaded before or after the accident.

There is a right to recover under the Federal Employers Liability Act only where the injury is suffered while the carrier is engaged in interstate commerce and while the employee is employed by the carrier in such commerce. The true test always is, "Is the work in question a part of the interstate commerce in which the carrier is engaged?" Pedersen v. D. L. & W. R. R. Co., 229 U. S. 146. In I. C. R. R. Co. v. Behrens, 233 U.S. 473, the court said:

> "Giving to the words 'suffering injury while he is employed by such carrier in such commerce' their natural meaning, as we think must be done, it is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employe is engaged is a part of interstate commerce."

To the same effect is Patry v. C. & W. I. R. R. Co., 265 Ill. 310; see also cases cited in Foreman T. & S. Bank v. G.T.W.Ry.Co., 242 Ill. App. 428.

When a car has been emptied of its load and it has not been determined whether its next haul will be interstate or intrastate, it is not engaged in interstate commerce. Bishop v. C. R. & St. P. Ry. Co., 217 Ill. app. 98. This has been definitely decided in Minneapolis & St. L. R. R. Co. v. Winters, 242 U. S. 353, where Mr. Justice Holmes said, concerning an engine which was not permanently devoted to any kind of traffic and which it did not appear was destined especially to anything more definite than such business as it might be needed for:

> "It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as to an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events."

In the absence of evidence to the contrary, empty cars will be presumed to be intrastate commerce. Peterson T. & S. Bank v. G.T.W.Ry.Co., 248 Ill. App. 418. Where there is no evidence as to the character of empty cars which are moved, it must be assumed that they are not cars engaged in interstate commerce. Roach v. C. C. I. & S. Ry. Co., 237 Ill. App. 04; certiorari denied by the Supreme court.

The unsatisfactory evidence in the record as to the vital fact whether the car in question at the time plaintiff was injured was unloaded or not, and the fact that evidence concerning this should be available, and the matter definitely determined, require that there should be another trial.

The questions relating to violation of any of the rules of the defendant by plaintiff, whether such violation was the proximate cause of the injury, whether there was any contributory negligence which diminished the damages and the assumption of risk, were properly for the jury to determine.

Criticism is made of some of the instructions which are technically justified, but such errors probably will not occur upon the second trial. Instructions referring to "negligence as charged" should be limited to such charges made in the declaration. The instruction referring to the employment by defendant of the "plaintiff" is inaccurate, as the plaintiff is the administratrix. Leftus v. Chicago Ry. Co., 251 Ill. 475. This, however, can be cured upon the second trial. The jury was fairly instructed as to the damages and as to the Federal Employers Liability act.

Complaint is made of certain hypothetical questions put to witnesses for the plaintiff. We do not think these can be called hypothetical questions. They were intended to obtain the

opinion of experienced men as to whose duty it was to see that the switch from the wash track to the long track was lined up or closed, so that the car upon which plaintiff was riding would have proceeded, as intended, northward on the wash track.

For the reasons above indicated, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and O'Connor, J., concur.

136 - 32077

247 I.A. 623

PETER M. HOFFMAN, Sheriff of Cook County, Illinois, for use of ELLA SCHACHTER,
Appellant,

vs.

ESLIEN COMPANY, a Corporation, and UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation,
Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff seeks the reversal of an order vacating and setting aside a judgment for $1493.12 had by it upon a trial before court and a jury, neither of the defendants appearing.

The judgment was entered June 6, 1927, and on July 7, 1927, defendants moved to vacate the same and upon hearing on said motion on July 15th the motion was sustained and the judgment vacated. The motion was not in writing and no petition was presented. Upon the hearing counsel for the defendants orally stated to the court not only their defense to the action but the grounds upon which they wished the court to vacate the judgment.

The defendants did not move to vacate the judgment until after the expiration of thirty days from the entry of the judgment. After the expiration of thirty days from the entry of a judgment, the Municipal court has no power in this cause to vacate it except on a petition setting forth the grounds for vacating the same which would be sufficient to cause the same to be vacated by bill in equity or motion in writing. Section 21, Municipal Court Act, chapter 37; Steudle v. Manthis, 185 Ill. App. 576; Gage Hotel Co. v. Eastman, 186 Ill. App. 393.

Defendants argue that it is immaterial whether the motion was made after the thirty day period, since the applica-

tion is addressed to the equitable powers of the court which has authority to set aside the judgment even after the thirty day period. This is not the law. Section 21 of the Municipal Court Act provides the only means by which the Municipal court has power to vacate or set aside or modify its judgment after the expiration of thirty days. It has been held that this is in effect the commencement of a new suit, in which it is proper to require issues to be made by pleadings and to require evidence to be heard. Imbric v. Beer, 230 Ill. App. 155.

The court was without jurisdiction to vacate the judgment of June 6, 1927, and its order of July 15, 1927, to this effect is reversed and the cause is remanded with directions to expunge said order from the record. See Price v. Maris, 247 Ill. App. 112.

REVERSED AND REMANDED
WITH DIRECTIONS.

Matchett, P. J., and O'Connor, J., concur.

246 - 32187

247 I.A. 629

GERTRUDE SAGER,
Appellant,

vs.

EDWARD SAGER,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE McCURDY DELIVERED THE OPINION OF THE COURT.

Complainant appeals from a decree dismissing, for want of equity, her bill for divorce and her amended bill for separate maintenance and finding for the defendant upon the allegations of his cross-bill, alleging that complainant had been guilty of extreme and repeated cruelty toward the defendant, and awarding him a decree of divorce.

The controversy must be determined upon the facts. The complainant testified that she was married in Chicago September 7, 1909, to the defendant, from whom she was separated on May 15, 1926, when he left her; that three children were born: the eldest, Grace, sixteen years of age at the time of the trial, Morton fifteen years and Patricia eight years.

The incident of May 15, 1926, which was followed by the separation, was, as she testified, that she and her son Morton went to a garage which was built by defendant; that she saw the defendant there in an automobile with a woman named Mary Murphy, with whom she had reason to suspect defendant had had improper relations; that defendant on seeing complainant called her vile names and jumped at her, pushing her with his fist all over her face, making her nose and lips bleed, kicked her in the stomach and struck her such blows as to render her unconscious.

Her story is corroborated by the son Morton, who said he saw Mary Murphy there; that defendant kicked complainant and hit her and she started screaming and told him to run for the police; that he saw the marks and bruises on his mother from the

blows of the defendant; that she could not walk and that they went home in a taxi. The daughter Grace also gave testimony tending to support this incident, saying that she saw her brother helping their mother upstairs; that her whole face was swollen and bruised and her clothes saturated with blood.

Complainant further testified that on May 11, 1926, defendant struck her in the forehead because she did not accede to his improper demands. Another incident was in July, 1922, when the defendant started to beat their three-year old daughter with a belt, and when complainant interfered she was beaten with the belt, pushed against the wall and was kicked. This latter incident was corroborated by the testimony of the daughter Grace, who also corroborated the complainant as to the occurrence of May 11, 1926. In the summer of 1923 she saw the defendant pick up a butcher knife and run after her mother. Another witness occupying an apartment in the same building testified that she saw the defendant come home one time at midnight intoxicated and heard him use vile and profane language, calling his wife all kinds of vile names.

Complainant testified that defendant brought the woman Mary Murphy, who was employed as a clerk by an office associate of the defendant, to their home and requested that she be allowed to stay for awhile, as she was not well, and that Mary Murphy stayed in their home about three nights a week, going elsewhere the other nights of the week, and that during these latter nights the defendant would not come home all night; that complainant objected to Mary Murphy's presence and told the defendant to stop his association with her because it was a big scandal; that Mary Murphy occupied the room with complainant's daughter Grace, and on one occasion at about two o'clock in the morning, defendant got some wine and went to the bedroom occupied by them and he and Mary Murphy ridiculed the daughter Grace because she would not

drink wine; that when complainant learned of this she ordered Mary Murphy to leave and thereafter defendant would not come home to dinner and remained away three and four nights a week and gradually took his clothes away; that she traced his address to No. 56 East Chicago avenue, and that she would see him come out of that building and that he pleaded with her at one time not to report this to the police; that one time an itemized bill from a florist came addressed to the defendant at their home, for flowers to Mrs. M. Segar, 56 East Chicago avenue.

Another witness testified that she saw the defendant and Mary Murphy together at a party and that their conduct was indecent; that one night in 1923 a little after Christmas, she saw the defendant's car standing in front of a building and saw the defendant come out about eight o'clock the next morning and Mary Murphy come out from the same place about eleven o'clock.

The court on motion struck out the testimony of this witness on the ground that the wife was not present at the time. Such ruling was manifestly erroneous.

Defendant testified that he was an attorney. He contradicted the testimony of the complainant touching the alleged acts of cruelty by him. On the contrary, he said that he treated her properly and that they had no serious trouble until along in July, 1922; that he had a caller and went to the dining room door and asked his wife and her mother to refrain from making noise; that complainant threw a cut glass candy dish at him, striking him in the chin, resulting in a scar. He denied other acts of cruelty on his part, although admitting that on May 11, 1925, he had a scuffle with his wife, in which, he said, his elbow hit her in the eye and she had a black eye in the morning. As to the incident on May 15, 1925, in the garage, he states that she was the aggressor; that he noticed the complainant and their son Marten standing there

doing something to defendant's automobile and he went over to see what they were doing, when the complainant grabbed hold of his tie, hit him on the ear and hit him with a bottle, which caused scars. He admits that he struck her at this time and shoved his hand into her face, which started her nose to bleed, but that he had to get away somehow. He denies that Mary Murphy was in the car.

Two witnesses gave evidence tending to corroborate defendant's version of the affair. Defendant admitted his presence at 56 East Chicago avenue, but says that he was there to see another party, a Mrs. D. (this is the only name appearing in the record) with reference to a bill for divorce which she contemplated; that defendant as an attorney went to this place to consult Mrs. D. with reference to representing her because she could not get away during the day. The evidence further showed that Mary Murphy was a law clerk in the office of a Mr. Boyle, an office associate of the defendant, and there was evidence that complainant had called at defendant's office and had made some disturbance about her. There was evidence indicating that defendant's absence from home was occasioned by his attendance on Masonic meetings and not because defendant was going with other women.

A doctor testified on behalf of the defendant that he treated the defendant for a cut on the lobe of one ear and for marks on the neck; that defendant was distantly related to his mother and that he was the witness's attorney.

Appellant argues that the decree is not supported by the evidence and that the record shows prejudice of the trial Judge which deprived her of a fair and impartial trial. There is justification for the claim that the remarks of the court indicate some impatience with the complainant because she did not insist upon a decree of divorce, which the chancellor indicated he would give her, rather than upon separate maintenance; that the decree rendered was the result of what the chancellor conceived to be

Going, according to defendant's witnesses, [illegible] eyes to see what they were doing, when the prosecutrix, [illegible], hit him on the ear and hit him with a bottle, [illegible]. He admits that he struck her [illegible] her face, which started her nose to bleed; [illegible] to go away crying." He denies that Mary [illegible] was in the car.

Two witnesses gave evidence tending to corroborate defendant's version of the affair. Defendant admits his presence at 52 East Chicago avenue, but says that he was not in the upper story, a Mrs. M. (this is the only name mentioned in the record with reference to a [illegible]) [illegible] defendant as an attorney [illegible] reference to representing her [illegible] the law. The evidence further showed that Mary [illegible] was a file clerk in the office of a [illegible] of the defendant, and there was evidence that [illegible] defendant's office and had [illegible]. There was evidence tending that defendant's [illegible] and by his attendance [illegible] was going with other women.

A police officer testified [illegible] the defendant [illegible] of the month; that defendant [illegible] and that he was the [illegible].

Appellant argues that the finding [illegible] the evidence and that the [illegible] of the trial Judge [illegible]. There is justification for the claim [illegible] some [illegible] with the complaining witness [illegible] even a degree of [illegible], with the [illegible], rather than [illegible] that the finding rendered was the result of [illegible]

stubbornness on the part of the complainant in insisting on her right to separate maintenance. We do not understand why the chancellor should think that complainant was entitled to a divorce because of the cruel conduct of defendant, but not entitled to separate maintenance.

As has been said many times, it is extremely difficult in such cases to arrive at a satisfactory conclusion as to which of the parties is telling the truth. Here, the parties are in direct conflict, each claiming kindly and dutiful conduct toward the other and acts of cruelty from the other. While it is evident that complainant is excitable and perhaps irritable, yet defendant in remaining away from home so frequently and in conduct with reference to the objectionable Mary Murphy would naturally cause his wife to be very much disturbed and to exhibit acts of hostility and, perhaps, even violence at times toward the defendant. The antagonistic relation between the parties in the first instance was evidently caused by the disloyal conduct of the defendant, and complainant's reactions thereto are not wholly without excuse.

The particular acts of physical assault by defendant upon the complainant are abundantly corroborated. Defendant admits striking complainant and causing her nose to bleed in the altercation in the garage. Upon the entire record we are convinced that the unfortunate relations of the parties were caused primarily by the defendant, and are of the opinion that the acts of cruelty alleged in complainant's bill for separate maintenance are supported by the preponderance of the evidence, and that the allegations of defendant's cross-bill were not sufficiently proven.

We hold, therefore, that the decree was improperly entered and it will be reversed with directions to dismiss defendant's supplemental and amended cross-bill for divorce for want of equity, and to enter a decree for separate maintenance on the amended bill of complaint of the complainant.

REVERSED WITH DIRECTIONS.

Hatchett, P. J., and O'Connor, J., concur.

294 - 32235

247 I.A. 629

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JOSEPHINE H. LAWRENCE,
Appellant,

vs.

JAMES C. DENVIR et al.,
Appellees.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE McGURDY DELIVERED THE OPINION OF THE COURT.

This is a suit for mandamus to restore the petitioner, Josephine H. Lawrence, to the position of Assistant Superintendent, Social Service, in the classified service of Cook County, in the Department of the Civil Service of said county. An amended answer was filed, to which petitioner filed a demurrer.

The brief of counsel for respondents gives no information as to the rulings of the trial court or as to how the cause was decided. The abstract describes the petitioner as "appellants" and the respondents as "appellees." Investigation discloses that the trial court sustained petitioner's demurrer to the amended answer of the respondents and ordered that the writ of mandamus issue against respondents, commanding them forthwith to restore the petitioner to the position of Assistant Superintendent, Social Service of Cook County, theretofore held by her and permit her to perform the duties and services connected with such position and collect the salary and compensation to be paid for the services rendered by said petitioner in the occupation of said position, and that petitioner recover her costs and charges. The respondents are the Civil Service Commissioners of Cook County, the Board of Commissioners of Cook County, the County Treasurer and Clerk and other officials of the county, and they appeal from this order.

The question is to determine from the pleadings whether the respondents abolished the position of Assistant Superintendent

Social Service, in good faith and for reasons of economy, or whether there was a pretended abolishment of the position, and the failure to appropriate for the position was on account of the alleged unfitness of the petitioner.

The petition as amended alleged that Josephine E. Lawrence was employed in the Civil Service Department of Cook County as Assistant Superintendent in the Bureau of Social Service of Cook County continuously since October 2, 1918, up to and including March 3, 1925, and had never been removed from said position; that the Bureau of Social Service ever since March 3, 1925, and at the time of the filing of said petition had plenty of work of the same kind and character such as petitioner had been accustomed to do in the performance of her duties; that the salary for petitioner's position had been appropriated in each year prior to 1924 and that in the year 1924 petitioner's salary was appropriated at $225 a month; that on December 2, 1924, the president of the Board of Commissioners of Cook county caused to be delivered to her a notice suspending her from her position for the period of thirty days "for disciplinary reasons," and directing that she turn over all property of Cook County to Miss Virginia Sanford, who had been directed to assume charge of the department; that petitioner asked the president of the Board of Commissioners to prefer charges, if there were any, against her before the Civil Service Commission, but neither during said period of thirty days, nor at any other time, were charges preferred. At the expiration of said thirty days, that is, on January 2, 1925, petitioner reported back to work and was directed to take orders from and report to Miss Sanford, who was continued in charge of the work which had been done by said petitioner, although said Miss Sanford was then and now is classified by the Civil Service Commission of Cook County in a lower rank and grade below the office and position held by the petitioner; that on March 3, 1925, the president of the County Board caused to be de-

livered to petitioner a notice that the County Board having failed to appropriate for the position of Assistant Superintendent, Bureau of Social Service, petitioner's services had been discontinued, effective March 1, 1926. The petition charges that the Board of Commissioners of Cook County has failed and refused to make an appropriation of salary for the position or place of employment of Assistant Superintendent, Bureau of Social Service, in order that petitioner's place or position might be used by others. Petitioner charges that said failure to make appropriation was dishonestly done in an attempt to deprive her of her position and to fill said position with some other person, contrary to the provisions of the Civil Service law.

The answer alleges that as a result of complaints the Board of Commissioners on April 21, 1924, appointed a special citizens committee to make an investigation of the activities and the organization conditions in the Social Service Bureau of the county; that this committee made a thorough investigation and submitted its report with findings and recommendations; that this committee, among other things, stated that the Bureau of Social Service was not rendering an efficient service to the county as the Board of Commissioners had a right to expect; that this was due (a) to defects in organization and (b) to personnel. The committee reported that it was unmistakably clear that the question of personnel was the more serious of the causes of inefficiency; that organization and the mechanical side of inefficiency could be changed and corrected, but it would always be subject to the human side - the personnel. The report reiterated that the explanation of the undesirable conditions in the bureau was in the personnel rather than in defective organization. The committee reported that the Assistant Superintendent of Social Service did not have executive ability sufficient to dominate a difficult situation and that she was not fitted for an execu-

tive position either by temperament or training. The committee did not consider her record of service sufficiently good to warrant her personal interests being considered in the plan of reorganization. The answer of respondents then asserted that the president and members of the County Board "being convinced that the recommendations of this report were necessary to the efficient and beneficial service of the county in order to accomplish the reforms suggested in the report, and for no other purpose," sent the notice of suspension to petitioner, discontinued and abolished the "position of petitioner" "by making no appropriation therefor and caused her to be notified of this action."

Section 12 of the Civil Service Act provides that "no officer or employee in the classified civil service of any city, who shall have been appointed under said rules and after said examination, shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense." Para. 897, chap. 24, Cahill's Illinois Statutes. The rule is now established that a position may be abolished by the mere failure to appropriate funds for the salary of the office, where this is done in good faith and in the interests of economy and in order to reduce expenses, and not for the purposes of evading the provisions of the Civil Service Act. Fitzsimmons v. O'Reill, 214 Ill. 494; Ellis v. People, 114 Ill. App. 145. Where, however, the position is abolished because of the alleged unfitness of the incumbent or because of any incapacity relating to personnel of the person holding the office, then such employee can be discharged only in the manner provided by Section 12 of the Civil Service Act.

> "While the city has a right to actually and in good faith discontinue any position when the same becomes no longer necessary or useful, yet neither it nor the commission had any right to continue the position in force and to remove appellee until charges had been preferred against him and sustained by the commission in the manner provided by section 12 of the Civil Service law. (City of Chicago v. Lathrop, 191 Ill. 516.) Neither the city nor the commission, nor both combined, can

legally abolish a position temporarily for the unlawful purpose of later re-establishing it and installing therein another person as employee. To permit such a course of conduct by the judgment of this court would be, in effect, to declare the Civil Service law a dead letter or a law enforcible only at the discretion of said city officers, whose positive duty, under the law, is to enforce it, or assist in enforcing it, according to its terms." The People v. Coffin, 242 Ill. 599, 610.

It clearly appears from the report of the committee, whose recommendation was followed by the County Board, that the causes of the alleged inefficiency related solely to the personnel, meaning the petitioner. The language of the report is that "she is not fitted for an executive position, either by temperament or training." The report does not find that the position was no longer necessary or useful, but that the person occupying the same was not competent. The recommendation of the report was, in substance, that petitioner should be removed from her position and some one appointed to take her place. The answer asserts that the president and the members of the County Board abolished "the position of the petitioner," and that they did this because they were "convinced that the recommendations of said report were necessary to the efficient and beneficial service of the county ** and for no other purpose." The answer asserts that the action of the Board was based solely on this report. Under such circumstances, if the County Board deemed her unfit, charges should have been preferred under Section 12 of the Civil Service Act.

It is obvious, therefore, that the failure to appropriate for the position was not for the purpose of abolishing the same in the interests of economy, but solely for the purpose of dismissing the petitioner. The answer not only admits but asserts this to be the fact. The action of the County board, while doubtless an honest attempt to improve the service, was not according to law.

The demurrer to the answer was properly sustained and

the order awarding the writ of mandamus properly followed. The judgment of the trial court is therefore affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

309 - 32250

247 I.A. 629

ARCHIBALD McFADDEN and GUS KONDRATH, for the Use of GRAY, NEWART & COMPANY, a Corporation,
Appellees,

vs.

PENNSYLVANIA RAILROAD COMPANY, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment against it of $44.50 upon trial by the court.

The statement of claim asserted an assignment of wages by Gus Kondrath due him from the defendant to Gray, Newart & Company, a corporation. A number of points are argued as grounds for reversal. We notice only a few.

Defendant says that the statement of claim and affidavit do not conform to Section 18, chapter 110, Illinois Statutes, which requires the assignee of a chose in action suing thereon in its own name to set forth under oath how he acquired title. This part of the statute is not applicable to the instant case, which is not a suit brought by the assignee in his own name, but is brought by McFadden and Kondrath for the use of the assignee.

It is also claimed that the notice required by Section 18 was not given. This portion of the statute requires that in all cases in which the chose of action shall have been assigned and which chose in action consists of wages due to the assignor thereof from the defendant, "at least five days written notice of the pendency of such suit shall be served upon the assignor of such chose in action, before the trial of the same." The record fails to show that such notice was served.

No. - 1096.

[illegible] and [illegible]
[illegible], for the use of [illegible]
[illegible] & [illegible], a [illegible],
[illegible],

vs.

PENNSYLVANIA RAILROAD COMPANY,
a Corporation,
[illegible].

[illegible]

[illegible]

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

This is an appeal [illegible] from a judgment against it of $44.50 [illegible] by the court.

The [illegible] of [illegible] by the [illegible] for [illegible], a corporation. [illegible] reversal. [illegible]

Defendant [illegible] not perform [illegible] which requires the [illegible] its [illegible] part of the [illegible] is [illegible] not a [illegible] by the [illegible] by [illegible] and [illegible] for the [illegible].

It [illegible] 13 has [illegible]. [illegible] all cases [illegible] which [illegible] from the defendant, "[illegible] the [illegible] of [illegible] [illegible] in [illegible], [illegible] to [illegible],

The statute contemplates that notice of such assignment shall be given to the defendant. It is the rule that where the statute requires notice and the mode of service is not specified, the service shall be personal. This rule seems to be universal. Wade on Law of Notice, sections 1334-1340; Am. & Eng. Ency. of Law, vol. 21, 2nd ed., p. 583; First Nat'l Bank v. Farmers Bank, 219 Ill. App. 624; Kinkade v. Gibson, 209 Ill. 246; Chicago & Alton R. R. Co. v. Smith, 73 Ill. 96. In Maj v. American Bottle Co., 261 Ill. 362, the court quoted from Carney v. Fully, 74 Ill. 379, as follows: "Service of a written notice always means actual, personal service." It is conceded that there was no personal service of notice on the defendant.

An attempt is made to show service of notice by mail, but even if service by mail were permissible, the evidence fails to show this. A witness testified that an envelope containing a notice was addressed to the "Pennsylvania Railroad, General Office, Attention: Paymaster," but the witness did not see it addressed, did not take care of the mail, and does not know whether it was deposited in the mails. The address itself is indefinite. This evidence fails to prove notice by mail.

The suit is brought in the names of Archibald McFadden and Gus Kendrath jointly, and there is no evidence whatever that the defendant was indebted to McFadden. It is well settled that there can be no recovery upon a joint assignment of wages against an employer where the evidence shows that one of the assignors was never in its employ. Siegel, Cooper & Co. v. Schueck, 167 Ill. 522; Baronski v. Shust, 218 Ill. App. 8.

There is evidence of what purports to be a joint assignment of wages from McFadden and Kendrath. Its terms are obscure and not easily read. There are also important omissions in the document. It would be very laborious and difficult to

determine the exact effect of the instrument.

For the reasons above indicated the judgment is reversed.

REVERSED.

Matchett, P. J., and O'Conner, J., concur.

374 - 32315

247 I.A. 329

KLEINBERG DRESS CO., Inc.,
a Corporation,
Appellant,

vs.

SOLOMON KOVLER, Doing Business
as Kovler's Princess Pat,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, doing business in New York City, sold through its salesman, Mr. Newman, a number of dresses to the defendant in business in Chicago. The order was given to Mr. Newman in the Palmer House, Chicago, and the sale was from his samples. The dresses were shipped to the defendant, who claims they were not according to the sample with the exception of three dresses which were retained. All the others were shipped back to plaintiff. Defendant was given credit for goods returned to the amount of $243.50, but plaintiff brought suit to recover the balance of the account amounting to $1414.50. Defendant by its affidavit of merits admitted owing plaintiff for the three dresses retained by it, amounting to $134.50, and judgment was rendered for this amount, which was satisfied and the cause proceeded to trial before the court and a jury for the remainder. The jury found the issues against the plaintiff and from the judgment on the verdict it appeals.

It is not disputed that in September, 1923, Mr. Newman had a conversation with defendant and his sister Bettie Kovler, who is associated with him in business. Her advice seems to have controlled the buying of dresses for young ladies. She testified, giving in detail the character of the samples carried by Mr. Newman and of changes which the buyers wished made and to which Mr. Newman assented. She says that the order, which described the dresses

and changes, was written by Mr. Kovler on Palmer House stationery; that this order was then given to Mr. Newman, who promised to send defendant a copy. Mr. Newman testified that he could not find this original order. Neither it nor a copy was introduced upon the trial. Mr. Newman testified that he gave Mr. Kovler a copy, but this is denied by both the defendant and his sister. The defendant testified that Mr. Newman did not at any time give or send a copy of the order to him and that he had never seen a copy.

Miss Kovler testified that when the goods were received she examined them and found them not according to sample and not as ordered. She stated in detail the particulars in which the dresses received differed from the samples. The samples were silk velvet; the dresses received were cotton velvet. The samples also had genuine beaver fur; those received had fur which is called imitation beaver. The waist-line, the length and the fit of the garments were not as ordered. It would serve no useful purpose to narrate all the particulars given by the witness as to the garments, and in any event they would hardly be intelligible to masculine minds. The jury was justified in believing her story and in concluding that the garments delivered were not like the samples from which they were purchased and that the changes ordered were not made.

Apparently all the goods returned were accepted by plaintiff except one package containing five dresses. The evidence was that these were delivered to the American Railway Express Company by defendant, but plaintiff refused to accept them.

Plaintiff claims that the trial court admitted evidence which was improper and prejudicial to plaintiff. The objectionable matter, however, was of no importance. It consisted for the most part of voluntary statements by Miss Kovler that a certain style "was very much in vogue" and that "most girls were her height," and similar remarks which, while perhaps not strictly relevant,

were not prejudicial.

It is said that the trial court erred in refusing to allow the plaintiff to read to the jury the affidavit of merits and the answer of defendant to certain interrogatories. The record shows no offer to read these documents. Defendant's counsel attempted to offer these documents in evidence, objections to which were properly sustained. Johnson v. Pennsyvania, [illegible] Ill. [illegible]; City of West Frankfort v. Marsh Lodge, 316 Ill. 43; F. M. Woodwall Construction Co. v. Hall, 198 Ill. App. 250.

There is no merit in the claim that judgment should have been entered for the plaintiff on the admissions in the affidavit of merits and upon the answers to the interrogatories. There is no admission in the affidavit of merits except as to $134.50, and we know of no practice which provides for the entry of a judgment upon anything said in an interrogatory filed in a civil action. Assets Adjustment Co. v. Atkinson, Kentzger & Grover, 180 Ill. App. 296.

There were no prejudicial errors on the trial, and as it cannot be said that the verdict is manifestly against the weight of the evidence, the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

401 - 32342

247 I.A. 630

EVA E. WOOD,
Appellee,
vs.
MIKE DRAGASH,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

In a suit brought for money alleged to be loaned to defendant, upon trial by the court plaintiff had judgment for $1,000, from which defendant appeals.

Plaintiff was defendant's mother-in-law. Defendant's wife died some little time before the trial and there followed a controversy between plaintiff and her two daughters on the one hand and the defendant on the other. It was asserted by defendant's attorney that when defendant's wife died she left him her property, of which plaintiff and her two daughters took possession, and that defendant brought citation proceedings against them in the Probate court to require them to deliver over the assets of the deceased wife's estate, and that the instant case and two others brought by plaintiff's daughters were instituted for spite.

There was a direct conflict of testimony. Plaintiff testified that she had been a housekeeper and had saved about $2,000 which was kept in a safety deposit box; that in October or the first of November, 1922, she loaned defendant $800 to assist him and his wife to pay for a bungalow; that again, on August 21, 1925, she loaned defendant $100 to redeem a ring. The evidence of plaintiff's two daughters, Mrs. Ethel Kunze and Mrs. Pearl Wilson, tended to corroborate their mother's version.

Defendant testified, categorically denying that he had ever borrowed any money from plaintiff, but claimed on the contrary that he had contributed to her support, giving her five and ten

dollars at a time because she always claimed to be poor. The bank book of himself and his wife was introduced in evidence, showing savings deposits ranging from September 5, 1923, to January [illegible], 1924, the balance at the last mentioned date being over $2[illegible].

Plaintiff had testified that defendant beat his wife. In rebuttal defendant offered to show letters received from his wife, while she was in a sanitarium in New Mexico, which it was claimed would show that the relations between them were affectionate. Plaintiff's testimony in this respect was irrelevant, but, having been admitted, the letters to defendant should have been admitted. Chicago City Ry. Co. v. Ehtera 212 Ill. 174.

Plaintiff says that her daughter, Mrs. Wilson, rented the safety deposit box but gave her the key to it; that the building was located on State and Washington streets. Mrs. Wilson stated that the box was in the safe of the Columbus Safe Deposit Company. The court inquired of defendant's counsel if he wished to go over and check up as to the fact of plaintiff having such a box in the latter part of 1922. Defendant's counsel indicated that he would do so and, if necessary, subpoena the books of the Safety Deposit company. The court then made a statement to the effect that his determination of the case depended upon the fact as to whether plaintiff did or did not have access to this box, and that if she did not, her story was false. The case was continued, apparently for the purpose of permitting counsel for defendant to ascertain the fact. At the next hearing the court announced that he was going to give the plaintiff judgment on the ground that she had a box with the Safety Deposit company; but how this information came to the knowledge of the court does not appear. Apparently the court inquired by telephone or otherwise from some one as to whether plaintiff had a box, but defendant never had an opportunity to subpoena the persons in charge of the Columbus Safe

Deposit Company nor to examine its books nor to cross-examine the person or persons with whom the court had conferred.

Upon the evidence in the record the case was very close. The court evidently was not convinced of the truth of plaintiff's story. In this state of the record judgment for the defendant should have followed. However, the court was persuaded to accept plaintiff's version by information obtained or given entirely outside the record. It is a well established principle that the court must confine his consideration of a case to the evidence given by the witnesses and appearing in the record. In so otherwise is to commit reversible error. Gilmore v. Kapp, 10[illegible] Ill. 297.

> "The theory of our system of trial is that the conclusions to be reached in a case will be induced only by evidence and argument, in open court, and not by any outside influence, whether of private talk or public print.
> "What is true with reference to a jury is true also with reference to a court." Patterson v. Colorado, [illegible] U. S. 454.

It has been held reversible error for a juror to visit the scene of an accident for the purpose of making a survey of the location of tracks and taking measurements. Chicago City Ry. Co. v. Strong, 127 Ill. App. 479. The court should not examine witnesses in the absence of counsel, and if he does so it is reversible error. Hurd v. Lill, 25 Ill. 497.

Under the circumstances we cannot permit this judgment to stand, and it is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and O'Connor, J., concur.

410 - 32351

247 I.A. 530

W. C. HANDLEY,
Appellant,

vs.

JOHN ANDRONICK and ANNA ANDRONICK,
Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Judgment was entered against both defendants by confession on a promissory note for $949, executed by John Andronick and endorsed by him and his wife Anna. Defendant Anna Andronick moved that the judgment be vacated and that she be permitted to defend, which motion was allowed. The case came on for trial before a jury which found the issues against the plaintiff, and from the adverse judgment plaintiff appeals.

The defendant says that she is unable to read or write the English language except to the extent of signing her name, and her defense alleges fraud in securing her endorsement in that it was represented to her that she was to sign only as a witness to identify the party signing the note. The note is executed by John Andronick alone as maker.

She testified that she was the wife of John; that she had been just four years in this country and could not read nor speak English; that her husband told her that he bought an automobile which was still in the garage and she asked him to take her to see it. The following Monday, when she returned from her work in the evening, at the request of her husband they went to the place of business where the machine was purchased. When they arrived there a salesman took her husband aside for about ten minutes and two men were "making papers" and one of them asked her to sign her name; she said, "What for sign my name? I don't

knew nothing of the machine. I don't buy it. I don't want machine; I got too much trouble working myself for living." The man replied, "You don't have to pay; you only sign you know that man; you witness." She said, "Yes, I know my man; I know this man." The witness said that she could not read the paper, but when her husband came in he signed the paper and a man gave her a pencil and said, "Listen, lady, sign this name; you don't have to worry; you don't have to pay this machine; you witness." Thereupon she signed the paper.

She is contradicted by the manager of the store which sold the machine, who says that he told her that she was to sign as a guarantor to secure the payment of the note. Defendant testified in rebuttal that the word "guarantor" was never used while she was there; that they did not read the note to her; that she told them twice that she could not read and that she was given the pencil and paper and requested to sign her name, the salesman saying, "You not have to buy that machine. That man have to buy it. You only witness that you know that man."

The jury believed defendant's version of the matter, and as it had the opportunity, which we do not have, of seeing the witnesses and observing their demeanor while testifying, we cannot say that its conclusion that the signature of the witness was obtained by fraud and misrepresentation is manifestly against the weight of the evidence.

Under the law of this state the defense of fraud in the execution of an instrument may be pleaded to an action based on a promissory note, whether such action is brought by the party committing such fraud or the assignee of the instrument. Sec. 10, chapter 98, Negotiable Instruments, Cahill's Illinois Statutes; Murphy v. Schoch, 138 Ill. App. 556; Sims v. Rice, 87 Ill. 69; Tayler v. Atchison, 84 Ill. 196; Leach v. Nichols, 78 Ill. 273.

Inspection of the note sued upon shows that the alleged words of guaranty are printed on the back of the note in fine print occupying nearly one-half of the space. Even a literate person would not have a clear idea of the meaning of these words without careful and protracted study.

We see no good reason for reversing the judgment, and it is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

440 - 32381

JOSEPH H. BRUTTAS,
Appellee,

vs.

EDWARD A. GARVEY, Doing Business as ED. A. GARVEY AND COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment against him entered upon a directed verdict in a suit in forcible detainer. The occupied premises known as Nos. 329-35 Plymouth court, Chicago, under a lease dated May 16, 1924, expiring April 30, 1928. Attached was a rider giving the lessor the right to cancel under certain circumstances. An attempt was made to exercise this right so as to terminate the lease January 31, 1927. The defendant refusing to vacate the premises, plaintiff brought this suit and had judgment.

Defendant's brief fails in every respect to conform to Rule 19 of this court, so that we have had difficulty in ascertaining the salient points which are said to require a reversal.

We gather from the record the facts to be as follows: The original lessors in the lease were the executors and trustees under the last will of Henry Sampson, deceased. By the rider, which was signed by both parties and made a part of the lease, the lessors reserved the right to cancel the same on May 31, 1925, or on the last day of any calendar month thereafter, by giving the lessee six months written notice, provided the premises should be sold or leased for a term of not less than twenty years, or if the building was to be demolished. The rider contained other provisions not in question, except that the lessee agreed to deliver up peaceable possession of the premises within the time specified in such notice of cancellation. The lease provided that the covenants and agreements should be "binding upon, apply and inure" to the

respective assigns of the parties. June 3, 1925, the trustees of the Sampson estate sold the premises to Alicia L. Byrne, who subsequently sold to Joseph H. Beuttas, the plaintiff. The notice to cancel the lease pursuant to the rider was dated July 15, 1926, signed by Alicia L. Byrne, and was served on the defendant July 17, 1926.

To show that this notice was effective, Bernard Nath, an attorney who handled the legal details of the sale, representing the purchaser (the plaintiff) testified that the deed of Alicia L. Byrne conveying the property to plaintiff was dated June 14, 1926, and delivered in escrow to the Chicago Title & Trust Company, to be held until the prospective purchaser's attorneys could examine the title to the property and restrictions as to party walls, building lines and other details; the deed was to be held in escrow until such time as the purchaser should deposit with the Trust company the balance of the purchase price.

July 14, 1926, the parties signified their readiness to close the deal, the balance of the purchase price was deposited and the deed was recorded on that date.

No objection to this line of testimony was made by the defendant until after the witness had been cross-examined, when defendant's counsel moved to strike the testimony on the ground that the acknowledgment of the notary public on the deed is dated June 17, 1926. This motion was properly denied.

As we gather it, defendant's main point is that defendant's lease was not properly terminated because, as alleged, Mrs. Byrne parted with her title on the date of her

deed to plaintiff, namely, June 14, 1926, and her notice to terminate was dated July 13, 1926, when she had no right of cancellation; citing Gates v. Norton, 272 Ill. App. 94. In that case the defendant was in possession of certain premises under a ten year lease dated May 1, 1914, which gave the lessor the right to terminate in the event of a sale. The lessor sold the premises to Curran; Curran sold to Miller; Miller sold to Amundson, who a few days later sold to Gates, the plaintiff. Two weeks after plaintiff acquired title he notified defendant that he had become the owner and that in the future the rent should be paid to him, which was done for a period of approximately six months. Gates notified the defendant of his election to terminate, and it was held that Gates was in no position to terminate a lease of this character; that it was only the original lessor or a grantee who could terminate by virtue of a sale; that the notice to terminate was given four months after the plaintiff had become the owner of the property, at which time the original lessor and plaintiff's grantor were entire strangers to this termination. The court held that the termination could have been accomplished under the terms of the lease by having the plaintiff's grantor, then the lessor, notify the defendant that his lease would terminate. The court further goes on to state that a different situation would have been presented had not the plaintiff, upon purchasing the property, assumed the position of a landlord toward the defendant by accepting the rent without having notified him of his (plaintiff's) election to terminate the lease. Having accepted the rent, the plaintiff stepped into the shoes of his grantor and thereby acquired his

rights and nothing more, "namely, the right to terminate the lease in the event of a sale of the premises by them." The difference between the facts in that case and those before us is obvious. Mrs. Byrne did not part with her title on the date appearing on the deed, but on the date of its delivery to plaintiff, July 14th, and at virtually the same time, namely, July 14th, the notice to terminate was executed and served July 17th. It should also be noticed that no rent was received by plaintiff between the time he acquired title on July 14th and the date of the service of the notice, July 17th. There is nothing in the record to insinuate that the relationship of landlord and tenant arose between the parties before the notice was served. We therefore have a situation for the application of this language in Gates v. Norton, supra: "The termination of this lease by reason of the sale to plaintiffs could have been accomplished, if desired, under the terms of the lease, by having the plaintiff's grantor, who was the then lessor, upon the event of his sale of the premises to the plaintiffs, notify the lessee that his lease would terminate."

Similar proceedings were considered in McClung v. McPherson, 81 Pac. 567 (Ore.), where it was held that the grantor had the right to terminate the lease upon the sale of the premises and to give notice thereof in its own right even after delivery of the deed. Another like case is Lewis v. Agnew, 96 Pac. 377 (Cal.) where the court, passing upon a clause similar to the instant rider, held that its evident purpose was to confer upon the lessors, upon sale of the premises, the right to deliver possession to the purchasers, and that not until the sale had been consummated could the lessor exercise the option to terminate the lease. See also Annotated cases 1916 B, 309; 16 R.C.L. 1113, sec. 629.

For Mrs. Byrne to terminate the lease before the consummation of the sale would have placed her in a doubtful position.

If she had done this upon the assumption that a sale would be made, she would have found herself without a tenant if the sale had failed. She did the safe thing and upon the consummation of the sale executed the notice of termination which was served upon the defendant. This was effective to terminate the lease January 31, 1927, and plaintiff was entitled to possession on and after that date.

The court properly directed a verdict for the plaintiff and the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

26 - 31941

247 I.A. 630

MOSES E. GREENEBAUM,
Defendant in Error,

vs.

GRACE FEINSTEIN,
Plaintiff in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

On September 9, 1924, Moses E. Greenebaum filed his bill of complaint against Grace Feinstein, in which he alleged that on March 28, 1923, the defendant being indebted to him in the sum of $4500 made, executed and delivered her thirty-six principal notes, thirty-five of them being for the sum of $50 each and the thirty-sixth note being for the sum of $2750; that to secure the payment of the notes and interest the defendant on the same day executed a deed of trust conveying certain property to Joseph G. Straus as trustee. It is further alleged that all of the notes have been paid except a balance of $2200 due on note No. 36; that the complainant turned over the notes and trust deed to Greenebaum Sons Bank & Trust Co. for collection, and that when the defendant paid to the bank certain interest due, it erroneously marked the principal note paid and delivered it to the defendant, and that afterwards the defendant fraudulently procured the trustee, Joseph G. Straus, to execute a release deed. The prayer of the bill was that a decree be entered declaring the release deed null and void, that it be removed from the records and that the defendant be decreed to deliver up to the complainant the note and trust deed.

The defendant filed her answer in which she set up that she had paid all of the notes in full and was entitled to a release deed and that there was no fraud in the transaction.

The case was referred to a master in chancery who took the evidence and made up his report. He found that there was still

a balance of $2200 due on note No. 36, but that through mistake it was delivered to the defendant, and that the release deed should be vacated and set aside, and recommended that a decree be entered in accordance with the prayer of the bill. Objections by the defendant to the report were over-ruled. They were ordered to stand as exceptions before the chancellor and they were over-ruled and a decree entered in favor of the complainant.

The evidence taken before the master is in sharp conflict. The testimony offered on behalf of the plaintiff tended to show that the $2200 had not been paid, while evidence on behalf of the defendant was to the effect that the $2200 had been paid.

The trustee in the trust deed was not made a party and in this court the defendant urges that the decree be reversed because the trustee was an essential party. We think the contention must be sustained. In this state it has been uniformly held that where any relief is sought under the trust deed, the trustee named in the trust deed is a necessary party. In the case of Hamilton v. Cobb, 35 Ill. 296, in considering a question similar to the one now under consideration, the court said (p. 300): "The rule in such cases, as to parties, is thus stated in Story Equity Pleadings, Sec. 207: 'The general rule in cases of this sort is, that in suits respecting trust property, brought either by or against the trustees, the cestuis que trust (or beneficiaries) as well as the trustees, are necessary parties. And when the suit is by or against the cestuis que trust (or beneficiaries) the trustees also are necessary parties. The trustees have the legal interest and they are therefore necessary parties. The cestuis que trust (or beneficiaries) have the equitable and ultimate interest to be affected by the decree and therefore they are necessary parties.'" The opinion in that case was written by Mr. Justice Scholfield. No case has been cited by counsel for the complainant that holds that a trustee named in a trust deed is not a

necessary party in a suit in which the trust deed is involved.

It is also the law that the want of necessary parties may be raised for the first time upon appeal. Garrison v. Johnson, 186 Ill. 19; Johnson v. Huber, 134 Ill. 511; Pakkter v. Jackson, 304 Ill. 569. In the instant case the trustee named in the trust deed not having been made a party, the decree of the Superior court of Cook county must be reversed.

The decree of the Superior court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur.

21 - 32019

247 I.A. 680

LIBERTY TRUST & SAVINGS BANK, as Administrator of the Estate of ERNEST STEFANI, Deceased, Appellee,	
vs.	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.
CITY OF CHICAGO, a Municipal Corporation, Appellant.	

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff as administrator of the estate of Ernest Stefani, deceased, brought this action under the statute to recover damages on behalf of the next of kin of the deceased on account of his wrongful death. The case was tried before the court and a jury and there was a verdict and judgment in plaintiff's favor for $7500.

The record discloses that on May 23, 1925, Ernest Stefani, a boy nine years old, was run over and instantly killed by a trailer attached to a motor vehicle which was being operated by the servants of the City of Chicago in the removal of garbage. The evidence further shows that at the time of the fatal accident, which was Saturday morning, the deceased and another boy eleven years of age were playing along the north side of Adams street, an east and west street in Chicago, just east of Bailey avenue, a north and south street; that at that time a five ton truck, with three garbage trailers attached, was standing in west Adams street. The trailers were loaded with garbage which had just been collected by employes of the City. The method employed was to hitch horses to the trailers, draw them through the alleys collecting the garbage and other refuse, then assemble them on Adams street, where the horses were unhitched and the trailers coupled onto the truck. The truck then pulled the trailers to a garbage disposal plant some distance

away. There was testimony to the effect that the deceased and his companion Michael Cummiskey, eleven years old, were helping the men in pushing the trailers so that they could be hitched to the truck and that the deceased was on the north side between the last two trailers, leaning over, when the truck started without warning and he was thrown over or fell, and the last wheel of the last trailer passed over his head so that he died almost instantly; that the driver of the truck started up when he was signaled to do so by a city employe standing at the south side of the trailers. Witnesses called by the City gave testimony to the effect that the boys were not helping to push the trailers together, but were playing on the sidewalk nearby and were not playing around the trailers just prior to the starting up of the trucks.

On behalf of the City it is contended that the court erred in over-ruling its motion, at the close of all the evidence, for a directed verdict, on the ground that there was no evidence tending to show negligence on the part of the employes of the City. We think the motion was properly over-ruled and that the question of the negligence of the city employes was one for the jury.

Complaint is also made that there was no liability shown because the City in removing garbage and rubbish was acting in a governmental capacity designed primarily to protect the public health and comfort, and that under such circumstances a municipality is not liable. A number of authorities are cited from other states announcing this rule. It would serve no useful purpose to discuss the authorities cited, because we have recently held that a municipality in cleaning its streets and alleys is performing a ministerial function. Hedtke v. City of Chicago, 248 Ill. App. 493, and Roumbos v. City of Chicago, 248 Ill. App. 500, (not reported). In these cases we refer to a number of cases decided by our Supreme Court where the same principle was involved and the

municipality was held liable. Under these authorities we hold that the City in the instant case is liable for the negligence of its servants. (For an interesting discussion of this question see 34 Yale Law Journal, pp. 1, 122, 229; 34 Harvard Law Review, p. 66.)

It is also contended by the defendant that the court erred in giving three instructions at the request of the plaintiff and in refusing one requested by the defendant. By the first of these instructions the jury were told that ordinary care on the part of the deceased at the time in question meant such a degree of care "as an ordinary prudent child of his age, knowledge, experience, capacity and degree of intelligence would usually exercise" for his safety under similar circumstances. It is said that this instruction was bad because there was no proof as to the intelligence and experience of the deceased. We think this is a misapprehension of the evidence as shown by the record. The evidence shows that the deceased was in the third grade in school; that he was in good health, had good hearing and eyesight and was an intelligent boy; that he had never had any accident or serious illness before; that there was nothing wrong with him physically or mentally. The instruction purports to lay down only a general rule as to the degree of care the law requires of a child, and there was no error in the giving of it. McGuire v. Guthmann Transfer Co., 234 Ill. 128. The second instruction complained of was on the question of damages and told the jury that if they found the defendant guilty as charged in the declaration, they should fix their verdict at such an amount as would be a fair and just compensation to the next of kin of deceased for the pecuniary loss, if any, resulting to them by reason of his death. It is said this instruction is erroneous because it did not limit the damages to those named in the declaration. We think there is no merit in this point. C. P. & E. R. R. Co. v. Payne, 59 Ill. 534. The next instruction to which objection is made was abstract in form and was merely a definition of what constituted negligence; and while such instructions are usually

not of much assistance to the jury, yet we think there was no prejudicial error in giving it. The instruction requested by the defendant and which the court refused was to the effect that the City was not liable for the negligence of its employes while carrying out a governmental function of the city. From what we have said on this subject it is obvious that the instruction was properly refused.

It is finally said that the verdict and judgment are excessive and that they are the result of passion, prejudice and sympathy. We have carefully considered all the argument made on this point, but are of the opinion that we would not be justified in saying that the amount of the verdict is so excessive as to warrant interference on our part. Wankster v. Gurney, 240 Ill. App. 165; Pasch v. Chicago Railways Co., 201 Ill. App. 241.

The judgment of the Circuit court of Cook county is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

102 - 32042

247 I.A. 331

SYLVESTER MURPHY,
Appellant,

vs.

WILLIAM D. MURDOCK,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant, claiming $1,000 damages on account of an alleged breach of a contract. There was a trial before the court without a jury and a finding and judgment in plaintiff's favor for $18.50 and plaintiff appeals.

The record discloses that on December 24, 1917, plaintiff bought from the defendant two lots and afterwards, on January 8, 1918, purchased another lot. The parties entered into a written contract for the conveyance of the three lots; the consideration for the first two lots was $778, which was payable in instalments, and the consideration for the third lot was $3[illegible], likewise payable in instalments. The last of the instalments were due and were paid in the year 1922, and on September 8, 1922, defendant by warranty deed conveyed the three lots to the plaintiff. Each of the contracts entered into for the conveyance of the property contained the following provision: "That all city assessments covering the installation of sewer and water shall be paid by the party of the first part" (the seller.) The warranty deed stated that the conveyance of the three lots was made "subject to all taxes and special assessments falling due and payable after date hereof." Apparently there were no special assessments against the property for the installation of sewer or water at the time of the making of the contracts. Subsequently special assessments for those purposes were levied and most of them were paid by plaintiff; and it is to recover the amount of these assessments from the defendant that plaintiff sues.

No. 18642

WILLIAM ADAMS, appellant, vs. VIRGIL O. ADAMS, appellee.	

[illegible]

[illegible]

[illegible]

Plaintiff's contention is that under the provision of the contracts above quoted, the defendant was required to pay all special assessments levied against the lots for the installation of sewers and water. On the other hand, the defendant's contention was that at the time of the conveyance of the lot by him to plaintiff, September 8, 1922, adjustments of these matters were made, and that under the provision of the warranty deed above quoted he was not liable for the special assessments because they fell due after the date of the deed. The trial court took the view that the defendant was not liable for any assessments falling due after the date of the deed. In this we think there was error. The deed did not have the effect of changing the terms of the contracts, and under the terms of the contract the defendant, the seller of the real estate, agreed to pay assessments that might be levied against the property for the installation of sewer and water. But we think the assessments levied for these purposes should be limited to the sewer, if any, that immediately serves the property. The lots face on West 70th place, and if they are served by a sewer in that street, the assessment which the defendant would be required to pay under the contract would be only for a sewer in that street, and the defendant would not be liable for assessments levied against the lots for the intercepting sewer in Crawford avenue, which is more than three blocks west of the lots in question. Most of plaintiff's evidence showed that he had paid assessments levied for the Crawford avenue sewer and for which we hold the defendant was not liable. Likewise we are of the opinion that the defendant would be required to pay only for such water assessments as serve the lots. We think this is a proper construction of the provisions of the contracts. Of course, if the defendant paid any of these assessments he would not be liable in this case. But on the trial he did not have the amounts which he testified he had paid.

Since we are unable to ascertain from the record the amount of the assessments levied against the lots for the purposes mentioned above, we are unable to enter judgment here, and therefore it is necessary for us to reverse the judgment and remand the cause.

The judgment of the Municipal court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., concurs.

McSurely, J., dissents: I think on the record the judgment should be affirmed.

138 - 32070

247 I.A. 361

FLORENCE DWIGHT VAN PATTEN,
Appellant,

vs.

STATE BANK OF CHICAGO, a Corporation, Trustee under the Will of JOHN H. DWIGHT, and PACIFIC SOUTHWEST TRUST AND SAVINGS BANK as Executor of the Last Will and Testament of FRANCES M. DWIGHT,
Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

This appeal involves the construction of the will of John H. Dwight, deceased. Counsel for the complainant states that "only one question is presented for the determination of this court, namely, whether the $170,000.00 trust fund should be held for the complainant during her lifetime as decreed by the chancellor, or whether it should be paid over to the complainant at once." We have examined the record and the briefs filed by both parties and are of the opinion that the only question for decision in the case is the one just quoted. There is no contention that any other question is involved.

The case was decided upon the pleadings, so the facts are without dispute. The record discloses that John H. Dwight executed his will on September 21, 1903, and a codicil thereto on January 30, 1907. He died on June 5, 1907, and the will and codicil were admitted to probate on July 9, 1907. At the time the will was made he was living with his wife and three children at his home in Lake Forest. At that time his wife Frances M. Dwight was 53 years old, his daughter Mary Dwight Harvey 28 years old was then the wife of Farrington Harvey, but afterwards the wife of Sidney John Morse, his daughter Florence M. Dwight, now the wife of John E. VanPatten, was 25 years old, and his son

Francis Bartow Dwight was 20 years old.

After providing for the payment of his debts and funeral expenses the testator gave to his wife certain personal property and $100,000. He then made certain specific bequests aggregating $11,000, and then provided a trust fund of $5,000 each for his three grandchildren who were living at the time he made his will and were the children of his daughter Mary.

The testator then gave, devised and bequeathed all the rest of his estate to the defendant, the State Bank of Chicago, as trustee, in trust upon specific terms and conditions as follows:

> "(a) Said trustee shall, as soon as it receives said trust estate divide the same into two parts of equal value, the decision of said trustee upon the equality of the division to be conclusive. These two divisions of the said trust estate are hereinafter called and shall by the trustee for the sake of convenience be designated as 'First Trust Division' and 'Second Trust Division.'"

The will then provides that the whole of the principal of both trust divisions should, while held by the trustee, be managed, invested and re-invested by the trustee. The next paragraph of the will is as follows:

> "(c) The division of the trust estate into two parts, as hereinbefore provided, shall be made as soon as practicable after the said trust estate reaches the trustee's hands."

Then follows a provision for the keeping of separate accounts of the two provisions. The next provision is that the net income from the First Trust Division shall be paid half yearly to the testator's wife during her lifetime and that:

> "At and upon the death of my said wife the principal of the trust property composing the First Trust Division shall be severed and turned over into the Second Trust Division, and become and be a part thereof, and shall be held, managed and finally turned over and distributed by the Trustee in the same manner and to the same persons and at the same times and in the same proportions as hereinafter provided for and in respect to the trust property composing the Second Trust Division. But if the property composing the Second Trust Division shall, at my wife's death, have already been turned over and distributed, in whole or in part, then immediately after her death the corresponding part or whole of the First Trust Division shall be turned over and distributed by the Trustee to the persons, under the terms hereof, entitled thereto."

The next paragraph of the will provides:

"(a) The trust property composing the Second Trust Division shall be divided by the trustee into three parts of equal value, one of which parts shall be for and shall be held in trust for the benefit of each of my three children, Mary Dwight Harvey, Florence R. Dwight and Francis Bartow Dwight."

Then follows a provision that if at the time of the division mentioned in that paragraph any of his three children are then deceased, leaving no issue surviving, the division should be into a correspondingly less number of parts for the benefit of the survivors; but if the deceased child left issue, such issue should stand and take the part of the parent if living. The paragraph then continues:

"but as to the shares of my own above named children who are in life at the date of said division into parts in this paragraph (a) provided for, the trust shall, under and subject to all the powers and provisions and duties in and on the part of the Trustee hereinbefore named, continue for the purposes and upon the terms below named and stated, to-wit:

(1) At the time of the division into three parts, in this paragraph (a) provided for, the portion of the respective shares of said Mary Dwight Harvey and Florence R. Dwight in excess of one hundred thousand dollars in value for each shall be turned over to each of them, said Mary and Florence, in absolute ownership and the remainder of their respective shares, of the value of one hundred thousand dollars for each, shall be held in trust by said Trustee for them respectively during their respective natural lives, and until their respective deaths, under the same powers and duties in and on the part of the Trustee as are hereinbefore set forth and provided. During their respective lives the net income from their respective shares so held in trust shall be half yearly paid over to my said daughters respectively on their respective receipts or orders. At the respective deaths of my said daughters, their then remaining respective shares shall at once be turned over and go in absolute ownership to their respective legatees or devisees, if they respectively leave lawful wills, and in default thereof to their respective Heirs at law, and as to such part so turned over the trust shall then be at an end."

By the next paragraph it was provided that the income of the share held by the Trustee for the son Francis should be paid to the son half yearly until he attained the age of 25 years, when one-third of the principal of his share should be turned over to him, and thereafter the income from the remaining two-thirds of the son's share should be paid to him half yearly until he was thirty years old, when another one-third of his share should be turned

over to him by the Trustee, and thereafter the income from the remaining one-third of his original share should be paid to him in like manner until the son was forty years old, when the remaining one-third of his share should be turned over to him and the trust as to his share should come to an end.

A further provision was that in case the son died before all of his share had been turned over to him, what remained of it in the hands of the Trustee should be turned over by the Trustee to the son's devisees or legatees; and in case the son left no will, to his heirs at law.

The will then provided by the next section that in case of any unforeseen reason the provision made for the testator's wife was insufficient, the Trustee might at its discretion give her part of the principal composing the First Trust Division.

It further appears from the record that at the time of the testator's death his wife was 55 years old, his daughter Mary 30 years old, his daughter Florence, the complainant, 27 years old, and his son Francis 22 years old.

After the payment of the testator's debts and the specific legacies by the executor, the State Bank of Chicago, it turned over to itself as Trustee the residue of the estate and divided it into two parts of equal value as provided in the will. One of these parts, the Second Trust Division, it further divided into three parts of equal value and held one of such parts in trust for the benefit of each of the testator's three children, as the will directed. Each of these parts amounted to $118,000, and the Trustee thereupon paid to the complainant $18,000 and to her sister Mary $18,000, leaving $100,000 in trust for each of the daughters in accordance with the specific direction of the testator. Mary died in September, 1926, and testator's widow Frances E. Dwight died on October 23, 1926. During the lifetime of the widow the

Trustee paid the income derived from the property in the First Trust Division to her, but it was not necessary to use any part of the principal for her support. After the death of the widow the Trustee divided the property of the First Trust Division into three equal parts and paid one of such parts to the son Francis, holding another of such parts for the heirs or legatees of the deceased daughter Mary, and the remaining part, the one in question in the instant case, is held by the Trustee for the complainant, which part, as stated above, amounts to $170,000. It is complainant's contention that the Trustee should turn the $170,000 over to her absolutely; while on the other hand the Trustee, the State Bank of Chicago, takes the position that this $170,000 must be held by it as a part of the property in the Second Trust Division for the benefit of the complainant so long as she lives, paying to her such income during her lifetime, and after her death that it go to her devisees or legatees or her heirs at law in case she dies intestate.

We have carefully considered the contention made by each side and are unable to agree with either contention; but on the contrary we are of the opinion that a proper construction of the will requires the Trustee to turn over the excess of $100,000, namely, $70,000, to the complainant for her own absolutely, and that the remaining $100,000 be turned by the Trustee into the Second Trust Division and held in trust for the complainant. The terms of the will require that the property, after the payment of debts and certain legacies, be divided by the Trustee into two parts of equal value, one part to be held for the benefit of the widow and the other for the testator's three children. The property held for the three children is to be designated the Second Trust Division, and it in turn is to be divided by the Trustee into three equal parts of equal value, one of such parts to be held for each of the testator's children. Paragraph (1) of section 4 of the will, above quoted,

provides that if, at the time the Trustee divided the property in the Second Trust Division into three parts, it were found that the property held for the complainant and the property held for her sister Mary exceeded the value of $100,000, the excess should be paid to them respectively. The property did in fact exceed $100,000 by $18,000, and $18,000 was turned over or paid by the Trustee to the complainant and an equal amount to her sister Mary.

The will also provides that at the time of the death of the testator's wife the property remaining in the First Trust Division should be turned over by the Trustee into the Second Trust Division and become a part thereof, and should be held, managed and distributed by the Trustee in the same manner and to the same persons and at the same time and in the same proportions as the property in the Second Trust Division. The will then continues: "But if the property composing the Second Trust Division shall, at my wife's death have already been turned over and distributed, in whole or in part, then immediately after her death the corresponding part or whole of the First Trust Division shall be turned over and distributed by the Trustee to the persons entitled to it." At the time of the wife's death the property composing the Second Trust Division had already been distributed in part to the testator's three children. The complainant had been paid the excess of $100,000 and under the wording of the will, upon the death of her mother she is entitled to a "corresponding part" of the property turned over from the First Trust Division into the Second Trust Division; and such corresponding part is the excess over $100,000, namely $70,000. There is no provision in the will that upon the death of the widow all of the property remaining in the First Trust Division should be turned into the Second Trust Division and set apart by the Trustee for the complainant Florence and held by the Trustee for her during her lifetime. Nor is there any provision

in the will that the property derived from the First Trust Division should be turned over absolutely to the complainant, but, as stated, we think the will provides that "the corresponding part" - the excess of $100,000 - should be turned over to the complainant and the $100,000 be held by the Trustee for her.

In view of the foregoing, the decree of the Circuit court of Cook county is reversed and the cause remanded with directions to enter a decree in accordance with the view herein expressed.

REVERSED AND REMANDED
WITH DIRECTIONS.

McSurely, J., concurs.

Matchett, P. J., dissenting: I think the decree should be affirmed.

208 - 32149

247 I.A. 631

JOHN J. CANCELMO, Administrator of the Estate of JOSEPH CANCELMO, Appellee,

vs.

ARLINGTON H. WELCH, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

February 7, 1924, plaintiff brought suit in the Municipal court of Chicago against Arlington H. Welch and Harriett C. Welch, copartners, doing business as Welch & Welch. Plaintiff's claim was for $839.45, which he averred was due him on account of the negligence of the defendants in failing to sell a carload of prunes which plaintiff had sent from Eugene, Oregon, to defendants at Chicago; that instead of defendants selling the car of prunes they, without authority, forwarded the car to William Gamble & Co., commission merchants of New York, and that Gamble & Co. sold the car in New York city, whereby plaintiff sustained the damages claimed.

The defendants filed an affidavit of merits in which it was alleged that an agreement had been entered into between them and John J. Cancelmo whereby the defendants would sell prunes shipped to them by him on commission; that John J. Cancelmo sent them several cars which were sold by them on a commission basis; that the car in question was shipped by Cancelmo September 23, 1922, with the statement that plaintiff "Would like to net fifty cents. Do your best." The affidavit of merits further sets up that the car arrived in due course in Chicago; that they attempted to sell the prunes but found that there was no market for them and thereupon they received instructions from John J. Cancelmo to ship the car

to William Gamble & Co. as Cancelmo's agent; that they were advised that the car was sold by Gamble & Co. and the proceeds forwarded to Cancelmo, who received the same in full satisfaction of the claim in question; that Gamble & Co. had been Cancelmo's agent in New York to sell prunes for him.

During the pendency of the case Harriett S. Welch, one of the defendants, died, her death was suggested of record, and the cause proceeded against the remaining defendant, Arlington H. Welch. There was a trial before the court without a jury, the court found in favor of the plaintiff for $707.78, entered judgment on the finding, and defendant appeals.

A reading of the abstract and supplemental abstract, as well as of the briefs filed by each side, does not give one a clear idea of the facts in the case, but upon a consideration of the record we think the following facts appear.

Plaintiff had been transporting prunes from Oregon to the defendants in Chicago, who were commission merchants, and the prunes were sold by the latter upon a commission basis; that the car in question was shipped by plaintiff on September 25, 1922, from Nyssa, Oregon, by plaintiff, billed to himself at Chicago, and while the car was en route, on September 30, 1922, it was diverted to Welch & Welch, commission merchants of Chicago, with instructions that they were to sell the prunes and that plaintiff would like to net fifty cents per case for the prunes. The car arrived in Chicago October 5, 1922, and there is some evidence that it was in fair condition at that time. On October 8, 1922, two days before the car arrived in Chicago, defendants wired plaintiff that they had sold the car of prunes; ten days later, October 18th, defendants wired plaintiff, "Went to sleep on no. 10376 (the car in question). Must have got mixed, its not sold." And again on October 16th, defendants wired plaintiff, "Not mixed when I reported it sold on 3rd."

On October 15th the defendants ordered the car shipped to Gamble & Co. at New York and it was accordingly done. The prunes were sold in New York and there was a deficiency of $153.38. The prunes did not sell for as much as the expenses incurred. The evidence further tends to show that the defendants were not authorized by plaintiff or any one else to forward the car to New York. There was further evidence to the effect that the prunes could have been sold in Chicago and some evidence as to the market value of the prunes at the time the car was standing in Chicago.

The defendant offered no evidence to sustain the averments of his affidavit of merits, which we have above set forth. The only evidence offered by the defendant was the testimony of a witness as to the length of time it would take to transport a car of prunes from Oregon to Chicago and from Chicago to New York. There was also offered on behalf of the defendant a letter written by John J. Cancelmo to Welch & Welch, but it has no reference to the carload of prunes in question and has no bearing on the issues involved. While the evidence is rather unsatisfactory and while some of that offered on behalf of the plaintiff should have been rejected, objection thereto having been made by defendant, yet upon the whole we think the evidence tends to show the facts as above stated. The court found in favor of the plaintiff and we are unable to say that his finding is against the manifest weight of the evidence. In this view, we would not be warranted in disturbing the finding and judgment.

We are advised that after the suit was abated as to the defendant Harriett C. Welch, another suit was brought by plaintiff against the administrator of the estate of Harriett Welch, deceased, to recover for the same cause as in the instant case; that both suits were tried upon the same evidence and the court made a finding against the defendant in each case for the same

amount and entered judgment against each. We are today handing down an opinion in the case against the Administrator of the estate of Harriett C. Welch; and while the plaintiff has two judgments for but one claim, he can have, of course, but one satisfaction.

A number of points are made by counsel for the defendant, but there is no authority cited that the procedure of the lower court was unwarranted.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Matchett, P. J., and McBurney, J., concur.

209 - 32150

247 I.A. 6317

JOHN CANCELMO, Administrator of the Estate of Joseph Cancelmo, Appellee, vs. ARLINGTON H. WELCH, Administrator of the Estate of Harriet C. Welch, Deceased, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

The record in this case consists only of the judgment entered in favor of the plaintiff and against the defendant, the appeal bond filed by the defendant and an order approving it. The judgment order is as follows:

> "This cause coming on for further proceedings herein, it is considered by the court that the plaintiff have judgment on the finding herein and that the plaintiff have and recover of and from the defendant, Arlington H. Welch, Administrator of the Estate of Harriet C. Welch, the damages of the plaintiff amounting to the sum of Seven Hundred Seven and 78/100 Dollars ($707.78) in form as aforesaid assessed, together with the costs by the plaintiff herein expended and that execution issue therefor."

Then follows the prayer and allowance of an appeal upon filing a bond in thirty days and bill of exceptions in sixty days.

The only complaint made is that the judgment is wrong in that it awards an execution, while it should have provided that the judgment be paid in due course of administration. This point is well taken and such is conceded to be the fact by plaintiff. The judgment is wrong only as to form and might have been corrected by the trial court without an appeal. We are also authorized to correct the judgment in this court. Cronk v. Giesske, 223 Ill. App. 256; Channel v. Merrifield, 302 Ill. 278.

The judgment will therefore be corrected in this court by striking therefrom the following words: "and that execution

issue therefor," and by inserting in lieu thereof the following: "and that the judgment be paid in due course of administration."

The judgment of the Municipal court will be affirmed as corrected.

AFFIRMED.

Matchett, P. J., and McBursly, J., concur.

247 I.A. 632

GEORGE C. BREIDERT, Appellee,	
v.	APPEAL FROM CIRCUIT COURT,
AUTO UTILITIES MFG. CO., et al.	COOK COUNTY.
AUTO UTILITIES MFG. CO., a corporation, Appellant.	

STATEMENT OF FACTS BY THE COURT.

This is an appeal from a decree in chancery affirming the findings of fact and conclusions of law of the master to whom the cause was referred, granting injunctive and other relief prayed for, and ordering appellant to execute and deliver to complainant an assignment of certain United States Letters Patent, and also all right, title and interest of appellant in, to and under certain contracts, writings and agreements relating to said patents and to the exercise of property rights thereunder.

A comprehensive understanding of the issues requires a rather full and chronological statement of facts.

Breidert, complainant and appellee, was the inventor of certain ventilators. Through arrangements he made with one Wilson, patents therefor were issued to the latter who put the device on the market. Later Wilson claimed absolute right to the invention and proceeds therefrom, and interference proceedings were instituted in the United States Patent Office, resulting in the recognition of appellee's rights as the inventor. After receiving assurances of his legal right as such and before instituting the interference proceedings, appellee approached one Peter L.

Wilbur, president of appellant, which was engaged in promoting certain other inventions, with reference to financing and promoting his inventions. After due investigation Wilbur decided to go ahead with the matter. But as his residence in New York and large business interests abroad kept him from Chicago most of the time, he left the management of appellant's business and subsequent arrangements with Breidert to Decker, appellant's vice president and manager. The arrangements with Wilbur were informal and oral and he did not wish to mix up the inventions with appellant's business.

In order not to delay their commercial development while the interference proceedings were pending Wilbur proposed that Breidert assign his application to appellant to hold and exploit the same for six months, within which time, as they were advised and expected, said interference proceedings would probably be determined in Breidert's favor, and then a new corporation would be organized, to which appellant should transfer the inventions and any patents thereon, the stock of which was to be issued in equal parts to Breidert, Wilbur and Decker. Accordingly on November 4, 1912, applications for patents were prepared in Breidert's name and assigned to appellant, and on November 11, 1912, they entered into a written agreement, signed by appellant and appellee, which provides that in consideration of one dollar by each to the other paid, and further consideration of the mutual covenants and agreements therein contained, appellant should for six months from that date manufacture and sell the ventilators, and appellee should render services promoting the sale thereof for said six months and receive therefor $25 a week and his traveling expenses as salesman, and in addition thereto one-half of the net profits from the manufacture and sale. While the agreement provided

Tillmer, president of Applicants, which was engaged in various long
equipment leasing transactions, with reference to financing and promoting
his inventions. After due investigation Tillmer decided to go ahead
with the matter. Had he the resources in the form of his own design
business interests abroad, he could have formed a subsidiary and thus
maintain the management of Applicants's operations and management
affairs-wise with Applicants in Canada, Applicants's sister corporation
and subsidiary. The only agreement with Tillmer was informal and until
and in fact was not, at the time of the transactions with Applicants's
business.

In order that to delay their commercial development while
the Patentee was procrastinating, was permitted Tillmer proposed that
Applicants undertake the application to experiment in order was applicant
the same for six months, within which time, as they were aware
and expected, with satisfactory results would probably be
determined in Applicants's favor, one than a non-competitive would
be approached, to which negotiations should another for variations
and may possible interest, the owner of which was to be invited to
equal parts to Applicants, Tillmer and himself. [illegible]
November 7, 1952, Applicants for patents were permitted to
Patentee's away and continue to experiment, and on December 12, 1952,
they entered into a written agreement, signed by Applicants and
Tillmer, which provided that in consideration of mutual reliance by
each to the other party, and further consideration of the mutual
covenants and agreements therein contained, Applicants should for
six months from that date manufacture and sell the ventilators,
and Tillmer would render services consisting the work required for
that six months and receive director fee a work and his services
expenses as salesman, and in addition thereto one-half of the net
profits from the manufacture and sale. While the attorneys preparing

that appellee should cause to be assigned at once to appellant all rights under the applications for letters patent the parties manifestly recognized the assignments already made on November 4, as a fulfillment of that provision.

The written contract further provides that at the expiration of six months a corporation should be formed under the laws of this state to which said applications and letters patent should be assigned, the capital stock of said corporation to be divided equally among Breidert, Illmer and Zecker (the latter as trustee for appellant).

Pursuant to the contract and understanding additional applications for letters patent of said ventilators or improvements were made and assigned to appellant and the patents were issued in its name.

Appellant having refused or failed to pay the final fee of $20 necessary to the issuance of a patent on the fifth application, appellee, to protect his rights, made arrangements with one Budge to pay the same. The patent, however, was pursuant to the assignment of the application issued to appellant. A somewhat like state of facts arose as to subsequent applications, referred to as "divisional applications", which resulted in three additional United States patents to appellant, said Budge by arrangement with Breidert having paid certain expenses and fees in procuring the same.

It was not until December, 1913, that there was a final decision for Breidert in the interference proceedings. Shortly thereafter by written agreement January 15, 1914, between appellant and the Chicago Car Heating Company the former granted the latter certain license rights for the United States and the Dominion of Canada in appellee's inventions. This agreement recognized appellant, the licensor, to be the sole owner of all right, title

and interest in and to the pending applications for patents, and as having full right to execute the license to manufacture, use and sell the ventilating device throughout this country and Canada for the full life of the patents that might be subsequently issued. Appellant agreed therein to prosecute Canadian applications covering the inventions for which applications were made or might be made, and that on its neglect or failure so to do the licensee had the right to do so and to deduct the expense thereof from the royalties provided for in the agreement, the patents to be subject to the license agreement.

Appended to the agreement was one signed by Breidert confirming and ratifying such agreement in all respects, and agreeing to execute all papers necessary for making applications for letters patent in the United States and in Canada upon the invention and the improvements relating to such ventilators, and to vest the legal right and title to said application in appellant. Thereafter a shorter form of this license was recorded in the United States patent office.

This license agreement was assigned with appellant's assent to said Nudge July 14, 1914, he agreeing to assume all of the obligations of the licensee, and on July 31 following, Nudge granted to Nudge & Company, of which he was president, the sole exclusive right and license to make and sell said ventilators in accordance with said license and assignment contracts for the period of a year from date of the license and thereafter until cancelled on notice.

On October 11, 1915, what is referred to as a "four cornered" contract was executed and signed by appellant as licensor, said car heating company as licensee, said Nudge as the licensee's assignee, and Otto R. Barnett, who had acted as attorney for

appellant in preparing said applications and procuring patents thereon, and to whom the licensee assigned on November 2, 1914, all of its rights under the agreement of January 15, 1914, and the royalties payable thereunder, to secure the payment of certain obligations due and to become due from the licensee to said Barnett. This agreement of October 15, 1915, modified the agreement of January 15, 1914, in slight respects not necessary to refer to.

Later, on March 1, 1916, Budge renewed the license to Budge & Company in accordance with the terms and conditions of the contract of January 15, 1914, as modified by the contract of October 11, 1915, for a period from the latter date to December 31, 1916, and thereafter until cancelled on notice, and Budge & Company is now in possession of and exercising the license rights vested in Budge, as aforesaid, under said license agreements, and also rights under the Canadian patents hereinafter referred to.

It appears, and the court so found, that the provisions of the agreement of November 11, 1912, between appellant and appellee were never carried out, and that the same was mutually abandoned with the understanding of the parties thereto that they would endeavor to arrive at some new agreement, and that pursuant to this understanding three options were submitted to appellee by Becker in behalf of appellant on January 15, 1914, (date of such license agreement) one of which was "accepted April 15, 1914," and so noted thereon, after Breidert added a provision for salary. That option was redrawn and signed by the parties and states appellant's offer to Breidert in the following form:

> * * * * 13 shares of Stock of the Auto Utilities Mfg. Co. and 5% Royalty on selling price of all ventilators sold or licensed to be sold.
> Salary for following year commencing June 1st, 1914,

to be $35 per week.

Accepted April 13th, 1914.
G. C. Breidert,
Auto Utilities Mfg. Co.,
per Jno. N. Becker,
Vice President."

On the date of such acceptance Becker delivered to Breidert a certificate of 13 shares of the capital stock of defendant which had previously been issued in Becker's name but was reissued under such date in Breidert's name, and beginning with June 1, 1914, Breidert received a salary at the rate of $35 a week, which was paid in full to August 15, 1914, and most of it until May 27, 1916, three days before his agreement for salary terminated, when because of differences over the character of his services he was discharged from the company's employ. Under the contract he had received about $112 in royalties.

In letters from Breidert to appellant, after his discharge, in the last half of the year 1916, he claimed appellant had not lived up to "the contract in connection with paying royalties." In one of them he said:

> "You certainly have not forgotten the 13 shares of stock which were issued to me as part payment of the patents assigned to the Auto Utilities Mfg. Co. by me which included a separate agreement and contract to pay 5% royalties on all sales."

This latter unquestionably harks back to the agreement of April 13, 1914. A letter from Barnett to appellant, dated January 20, 1917, informed it that appellee had directed his firm to file a bill in chancery "for an accounting of moneys due him under his royalty agreement with you, for the recovery of the unpaid balance of salary due him, for a reconveyance to him of his patents because of your failure to pay royalty as agreed, for a receiver of the company." The letter also referred to Breidert as owner of 13 shares of appellant's capital stock and as having demanded an accounting without success. In reply appellant asserted that the

claims were without fundation - that Breidert had no royalty agreement with it, no right to demand an accounting, no balance of salary due him, that the patents were paid for in full, and that the 13 shares of stock should be returned because Breidert failed to sign the proposed agreement that was submitted to him as contemplated by the preliminary agreement of April 13, 1914.

Barnett, (or his firm) who prepared the applications for patents and assignments thereof above referred to, seems to have had occasion to press payment of his bills, and to pay him appellant ultimately borrowed money from one S. A. Woodworth, to whom appellant assigned all of its rights to royalties under the contract of January 15, 1914. After the filing of the bill Woodworth died and his widow, Marion L. Woodworth, as executrix, and sole heir, was made party defendant by a supplemental bill. The assignment purports to be absolute and was never cancelled. It was in fact given as security for the loan, as aforesaid, and the debt has been satisfied. The decree directs conveyance of her rights to Breidert.

Three Canadian applications for patent and assignments thereof by Breidert to appellant were prepared by Barnett on February 23, 1914, and executed March 2, 1914. They were never filed for the reason, as claimed by Barnett, that the government fee of $60 was not paid to him. It appears that he had authority to file them, and by letter of March 11, 1914, notified appellant that he had filed them. As bearing on appellant's alleged neglect to pay said fee and also the final fee of $20 for the fifth United States patent, it appears that both were charged to appellant in Barnett's bills as rendered and finally adjusted. The relations between Barnett's firm and appellant having ceased the firm thereafter represented complainant herein and Munn & Co. who filed a cross bill in the nature of a bill of interpleader.

The time having expired for taking out the Canadian patents, and Mudge having discovered that the applications therefor had not been filed, and that patents could then be procured only by special act of the Canadian Parliament, entered into an agreement with Breidert on December 30, 1916, for an assignment to him of all right, title and interest in the inventions for Canada, together with the applications for letters patent thereon, and that might be granted therefor, in consideration of certain royalties to be paid Breidert, subject, however, to such rights, if any, as appellant might establish to or under said letters patent, and pursuant to their petition therefor a special act was passed under which Canadian patents were issued to Mudge December 25, 1917.

On September 18, 1917, Mudge granted to Mudge & Co. the full and exclusive right and license in, to and under the Canadian patents.

Appellant having notified Mudge and Mudge & Co. that if they did not pay the royalties under the agreements of January 18, 1914, and October 11, 1916, it would proceed under their provisions to terminate all their rights as licensees, Mudge & Co. and said Mudge notified appellant that they would pay all royalties to appellant and not to appellee. Mudge & Co. stand neutral in their cross bill, ready to abide by the decree of the court in the premises.

The bill as amended August 9, 1921, which is predicated on the main facts above stated prays, in the alternative, (1) that complainant be decreed the owner of the 13 shares of stock, and that he be paid 5% royalties under his contract with appellant, and the remaining part of his salary under the contract of April 13, 1914; that a receiver be appointed, that Mudge & Co. be

The time varying angles for taking off the landing
pattern, and Judge Hodges directed that the application
for bond not been filed, and that pleadings could then be amended
only by general and of the Indian Claims Commission, because from an
agreement with Southern Ute Tribe, Inc., for an assignment
of all rights, title and interest in the Interior for
Canada, together with the applications for Indian Bonds
and that might be granted Interior, in consideration of certain
royalties to be paid Brunhoff, Inc., however, to such rights,
it may, an application under subsidiary to an issue with Indian
patent, and furnish to their petition therefor a special and ex-
pressed agreement which Southern Ute Tribe in Judge December
20, 1957.

On September 12, 1957, Judge filed to Judge a
the full and exclusive rights and interest in, to and under the
Canadian patents.

Appellant having notified Judge and Tribe of, that
if they did not pay the royalties under the agreement of February
12, 1958, and further the Bond, it would present such
provisions to terminate all their rights in Canada, Judge
Co. and the Judge entered applications that they still pay all
royalties to appellant and not to appellee. Judge's for stand
mounted in their cross bill, ready to abide by the decree of the
court in the premises.

The bill on cross claim 6, 1957, which is pending
on the main Tribe above stated prayer, in the alternative, (1) that
compliance be deemed the terms of the 12 months of time, and
that be paid BC royalties under the contract with appellant,
and the remaining part of the royalty under the contract of April
12, 1949 that a receiver be appointed, that Judge's Co. be

perpetually enjoined from paying royalties to appellant on ventilators sold in Canada, and that appellant have no rights in the Canadian patents; or (2) that in case there was no consideration for the agreements between appellant and appellee then appellant shall account to appellee for all profits, proceeds and royalties received, and pay them over to complainant; and that all patents held by appellant and all of its interests in the license agreements be reassigned to complainant, and that Mudge & Co. be ordered to pay all unpaid royalties to complainant.

The cross bill of Mudge & Co. on substantially the same facts prays that it may deduct from any royalties the cost of procuring any of the Canadian patents, and offers to pay the balance of the royalties as directed by the court.

The answer of Mudge & Co. practically admits the allegations of the amended bill, and the answer of appellant admits the execution of the several applications for patents and assignment thereof, the verbal and written agreements aforesaid, and in substance denies that it has failed or refused to carry out its contracts.

The decree finds the equities are with appellee and decrees that appellant execute and deliver to him an assignment of all the United States letters patent aforesaid, all its right, title and interest in and to the contracts of January 19, 1914, July 14, 1914, and October 11, 1918; that the Canadian letters patent are not subject to said agreements nor the agreement of November 11, 1918, but only to the agreement of December 30, 1915, between Breidert and Mudge; that appellant has no right, title or interest in the Canadian patents and should account to and pay royalties thereon to Breidert under the last mentioned agreement; that Marion Woodworth convey to Breidert all rights conveyed to H. L. Woodworth, deceased, that Mudge & Co. pay Breidert all unpaid royalties that

have accrued under the agreements of January 15, 1914, and October 11, 1915, as to the United States patents, and, under the agreement of December 30, 1910, as to Canadian patents, and all that may hereafter accrue, subject to any proper deduction for expenditures; and enjoins appellant from interfering with the license rights of Mudge & Co. under the agreements of January 15, 1914, and October 11, 1915, and appellant and Marion L. Woodworth from in any way disposing of any right, title or interest in said patents, etc., except in compliance with the decree.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

There is little contention or dispute as to the controlling facts of the case. They may be accepted as above stated. The main contention is as to their construction. The principal findings on which the decree is based are that the two original applications were assigned to appellant without any consideration passing to appellee; that appellant refused to pay the final fee of $20 on said fifth application and thereby abandoned the same and any patent that might be thereafter granted thereon, and, for failure to pay the final fee for obtaining patents under the so-called "divisional" applications, it abandoned all rights thereunder and to the patents issued thereon; that the agreement of April 13, 1914, was merely a preliminary memorandum for the basis of a contract, that was never completed; that the 13 shares of appellant's stock were not issued to appellee from its treasury but was stock that had been up to that time personally owned by Becker; that appellant never paid appellee his salary of $35 a week in full, as provided by said agreement of April 13, 1914, and discharged him without reason, and was then indebted to him in the sum of $350 salary in arrears that is still unpaid, and has refused to pay appellee any royalty or to render him any account, etc.; that appellant has denied the existence of any valid agreement between it and appellee or any obligation to pay him royalties and his right to hold said shares of stock, which he has now tendered back to appellant; that appellant failed to pay the necessary fees and expenses for taking out the Canadian patents and allowed its rights to the inventions, and those of complainant thereto, to lapse; that appellant is now in equity without any right in or to any of said Canadian letters patent or to receive any royalties from the same under the provisions of the

agreements of January 15, 1914, and October 11, 1915, and that its claim to such royalties constitutes a cloud on complainant's rights in the premises, and that he is entitled to receive all royalties payable to appellant by Hodge & Co. and that the Woodworth claim to royalties has been satisfied.

While most of these findings of fact are not questioned some of them, and the principal conclusions on which the decree mainly rests, may well be. It is perfectly clear that the assignments and agreement therefor made November 4, 1912, were in contemplation of the written agreement of November 11, and merged into it, and that not only the mutual agreements made November 4, but the mutual covenants in the written agreement constituted a valuable consideration for such assignments. In carrying out its part of the agreement the proof shows appellant not only expended thousands of dollars in the manufacture and sale of the ventilators but paid out thousands of dollars to procure the patents, and gave complainant royalties and employment as therein provided. While no new corporation was organized to promote the inventions at the expiration of the six months referred to in the contract, no final decision in favor of Breidert having been reached in the United States patent office until over a year later, the parties apparently recognized after the lapse of time that the necessity for a new corporation had ceased and that appellant should continue to handle the inventions. The court so finds in effect. Thereupon appellee, on April 13, 1914, accepted one of the three options previously tendered to him as aforesaid. It is true that the parties contemplated a more detailed agreement, and one was drawn and submitted which Breidert declined to sign, and no subsequent agreement was made. Nevertheless the parties went on under the skeleton agreement of April 13, 1914, and under it Breidert received the 15 shares of stock, was put on the salary

basis therein provided for and receives royalties under it. Even if appellant is in arrears for such salary it does not change the fact that each recognized the existence of such a contract between them. Breidert recognized it for years and made no attempt to question or rescind it until he filed his bill.

Nor is it material that the certificate of the 13 shares of stock was first issued to Decker, before reissued in Breidert's name. He got it in pursuance of the contract. In fact, after he was discharged he retained the certificate, insisting on his rights as a stockholder in appellant company, and recognized the validity of the contract otherwise by requesting an accounting for the royalties it provided for. Appellant's attempted repudiation of his rights as a stockholder and to an accounting in the letter to Barnett, after both parties had been acting under the agreement, does not negative the fact that both parties had recognized it as binding up to the time they had a falling out, which was not on the claim by either that there was no agreement, but because of a disagreement whether appellee was performing the services it required. Their intention was manifest. Breidert had received a salary in accordance with its terms, and $112 in royalties, and still insisted upon his rights as such stockholder; and appellant continued to employ him at the contract salary up to the date of such disagreement, paid him royalties and delivered him the stock contracted for. Each provision of the contract having been mutually recognized and acted upon, both parties are estopped from holding that no contractual relation existed between them, or that the existing agreement was abandoned for failure to perfect other contemplated arrangements, for after a failure to agree upon them, they continued to recognize the validity of and act under the skeleton agreement. The fact that a more detailed agreement was contemplated did not

prevent the so-called preliminary agreement from taking effect in accordance with the clear intention of the parties as manifested by their conduct. (Scott v. Foeler, 237 Ill. 104, 108.)

In fact the first theory on which appellee's bill asks for relief is based on the validity of the contract, and a right thereunder to an accounting for royalties and unpaid salary and to retain said stock. The other alternative theory on which the decree rests, that there was no consideration for said assignments, and that appellant abandoned its rights under the contract and forfeited them has no valid foundation either in fact or law.

When appellee was tendered the option as accepted he had already confirmed and ratified the license agreement of January 15, 1914, and practically became a party thereto. He expressly ratified and recognized the validity of appellant's right to grant such license, its title under his assignments and the agreements as the basis therefor. There was not only a consideration, as aforesaid, for such assignments under which appellant obtained title to the patents and upon which such license agreements were based, but appellee under such circumstances is estopped from asserting that appellant acquired no title to the patents or rights under the license agreements. In fact he stands in the anomalous position of recognizing the rights of the licensees and denying the rights of the licenser on the ground of no consideration for the assignments on which the license agreements primarily rest.

But if appellee had any right to rescind his contract with appellant for failure or refusal on its part, if any, to make a complete or further contract, then he should have acted upon such right within a reasonable time after such failure or refusal and have offered to place appellant in statu quo. On the contrary, he impliedly acquiesced therein by continuing the contractual relations

for a long period of time thereafter and until disagreements of a different nature arose that prompted this suit.

So far as any right to rescission on his part is concerned he has failed either to plead or show that he could put appellant *in statu quo* with respect to the expenses it has incurred in procuring the patents and promoting the inventions. The evidence discloses that appellant paid out about $6,000 in prosecuting the United States patents, and nearly $5,500 to Breidert in salary and other expenses in promoting the inventions. Nearly $4,000 was paid in prosecuting the interference proceedings which took from Wilson the two basic patents whereby Breidert regained his rights as inventor. Complainant's claim to rescission rests primarily on either alleged breaches of contract or want of consideration therefor, and on no independent ground of equitable jurisdiction, other than for an accounting. In such a case the equitable relief of rescission will not be granted unless the parties can be put back *in statu quo*. (*Madson* v. *Clark*, 165 Ill. App. 228; *Blake* v. *Pine Mountain Iron & Coal Co. et al.*, 76 Fed. 624, 639; *Forster* v. *Black*, 140 Wis. 48.) A party cannot have a contract rescinded, as a general rule, and at the same time retain a part of the consideration received by him. (*Madson* case, *supra*; *Bigdon* v. *Calcott*, 141 Ill. 649.)

Regardless of whether appellant actually refused or merely neglected to take out further United States patents and the Canadian patents, they were ultimately taken out by Budge, who, as assignee of the licensee to all such patent rights under an agreement whereby the licensee was authorized to take out such patents and to charge the expense thereof against the royalties to be paid thereunder, assumed the obligations thereunder of the assignee. While he ultimately paid the necessary fees and expenses

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for taking out such further United States patents and the Canadian patents, he was bound so to do to preserve his own rights as such assignee and those of his company. Unwilling to sacrifice them he took the steps aforesaid and could not alter appellant's rights under the license contract by so doing. Having done so he cannot equitably claim the acquisition of new rights that entirely defeat those of the licensor, or any other right than that to charge the expenses so incurred against such royalties, as provided in the license contract. Nor can Breidert assert such a claim. The obligations of appellant to him remain unchanged. That a special act of the Canadian Parliament became necessary by reason of the running of the statute of limitations against taking out patents in appellant's name is as much chargeable to neglect and lack of diligence on the part of Budge as appellant, in view of the provision in the license contract authorizing the licensee (in whose shoes he stood) to take out such patents and to charge the cost thereof against royalties. He manifestly took them out for his own benefit, or that of his company, and thus preserved his contract rights thereto under the license agreement. If he deliberately allowed the statute to run he acted in bad faith. If he did not he simply neglected his own interests, and should not be permitted to profit thereby. He was affected only by being put to greater expense and trouble to procure the patents, for which, however, he is entitled to credit on the royalties he is to pay under the license contract. He practically holds the Canadian patents in trust for the exercise of his rights under the license agreement.

Nor is there any equity in forfeiting appellant's entire rights to either the United States patents or the Canadian patents because of either refusal or failure to pay the small sum of $20 necessary for the former, and $66 necessary for the latter, when

the licensees were entitled to procure the patents by advancing such sums and charging the same to appellant. "Forfeitures are not regarded with favor, and their prevention is within the protecting care of equity wherever wrong or injustice will result from their enforcement." (Podsworth v. Podsworth, 154 Ill. 49, 52.) That great injustice would result therefrom in the present case is too evident for discussion.

We cannot, therefore, agree with the conclusions of the chancellor that appellant has abandoned its entire rights to either the United States or the Canadian patents, or that it should be required to surrender its title thereto. It follows that the court erred in its findings in that regard and in entering a decree requiring appellant to convey its titles to said patents to Breidert, and that Mudge & Co. pay the royalties under the license agreement to Breidert, and that the Podsworth title be conveyed to Breidert. But Breidert is evidently entitled to an accounting. His waiver of it was presumably because of granting the alternative relief prayed for. And he is entitled to retain his stock.

We think, therefore, the court should have sustained the exceptions to the master's report so far as the findings and conclusions therein conflict with those we have reached, and that the case should be sent back for rulings in accordance with this opinion, and thereafter to the master for an accounting for such royalties as Breidert may be entitled to under the contract of April 13, 1914, and for what may be due him by way of salary, if any. To be sure, if the last item alone were involved he would have his remedy at law. We think however, there is equity in the bill for a claim for an accounting.

The decree must be reversed with directions for proceedings in conformity with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley and Scanlan, JJ., concur.

64 | 247 I.A. 032

42 - 31973

SHERIDAN MEN'S SHOP, a corporation, Defendant in Error, v. ARTHUR MICHEL, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

Defendant in error (plaintiff below) brought an action upon a check drawn by plaintiff in error, payable to the order of one Fisher and by him endorsed. Payment thereon was stopped by defendant.

The statement of claim alleges these facts and that Fisher endorsed for value and delivered the check to plaintiff.

Defendant filed its third amended affidavit of merits setting up therein facts constituting fraud on the part of the payee in procuring the check, whereupon defendant stopped payment thereon, and then alleges "affiant denies that the plaintiff acquired said check for value or without notice of the fraud set forth."

The affidavit was stricken on defendant's motion and defendant elected to stand by it. Judgment was entered as of default, and this writ followed.

It is not questioned that the fraud pleaded would vitiate the check in the hands of one taking it with notice thereof, or that absence or failure of consideration is a matter of defense against any person not a holder in due course.

The sole question raised is whether the amended affidavit of merits specifies a legal defense. Defendant in error argues that it does not comply with a rule of the Municipal Court, in which the judgment was entered. The contention cannot be considered for the rules of that court not being in the record we cannot take cognizance of them.

But we think it complies with section 58 of the Practice Act, requiring the defendant to specify the nature of his defense in his affidavit of merits. The object of that section is to apprise the plaintiff of the nature of the defense sufficiently to enable him to meet it. If it is an affirmative one, the defendant is required to set forth the ultimate facts on which it rests. If it is a negative one, - denying pleaded facts essential to plaintiff's recovery - a mere denial of them is sufficient.

While perhaps the defense might have been stated more scientifically, plaintiff was sufficiently apprised of what he had to meet. The affidavit effectually pleaded two ultimate facts constituting the defense that plaintiff was not a holder of the check for value in due course, by denying that the delivery thereof was for value, as plaintiff alleged, and by asserting that he took the check with notice of such fraud. Practically the only way defendant could meet the affirmative statement of delivery for value, was to deny it. The defendant does not have to plead evidenciary facts to disprove what plaintiff affirmatively asserts. Here the plaintiff could not have failed to understand that the defense rested on said two facts, which, if true, would defeat the action.

We think it is more or less hypercritical to hold that

such an affidavit does not state a defense. Such strained construction is not calculated to promote either a speedy or a just disposition of cases, or the simplicity of pleading contemplated by the Municipal Court Act.

For error in striking the affidavit the judgment will be reversed and the cause remanded with directions to try the issues so raised.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley and Scanlan, JJ., concur.

52 - 31987

NATHAN D. MONNY, Appellee,	
v.	APPEAL FROM CIRCUIT COURT,
LUTHER E. COHOON et al.	COOK COUNTY.
CENTRAL LIME & CEMENT COMPANY, a corporation, Appellant.	

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant company from a decree setting aside a warranty deed from appellee to defendant Cohoon, who was defaulted, of two certain lots, and setting aside a judgment obtained by appellant against said Cohoon as a cloud on appellee's title to said lots.

The controlling question is whether appellant had constructive notice of appellee's claim of ownership of the lots when it obtained said judgment on March 26, 1926.

Appellee's claim is predicated on an unrecorded contract between him and Cohoon, induced by the latter's false representations and entered into February 9, 1925, on the day appellee executed said warranty deed to Cohoon, and his continued possession of the lots. Under said contract Cohoon was to erect, in accordance with certain plans and specifications, on representations of his financial ability to do so, a two-flat building on one of said lots and to reconvey the lots with such improvement to appellee on his payment of a net sum of $14,000 in monthly installments of $100 each, Cohoon to hold title under the deed as security for appellee's compliance with the contract. We need not go into

its details for Cohoon, contrary to his representations, was in financial straits, and never undertook to comply with it or take possession of the lots. They adjoin one another and are vacant except for the foundation of an unfinished structure placed on one of them for appellant by another insolvent contractor under a previous abandoned contract. Appellee has continued to exercise ownership over the property and possession thereof by paying the taxes thereon and maintaining thereon signs stating that he is the owner and giving his address and telephone number.

The case was heard on appellee's testimony alone and a stipulation as to the rendition of such judgment, the issuance of an execution thereon within a year, and that if certain witnesses were present they would testify that appellant did not know of any interest of appellee after the recording of the warranty deed.

Appellee testified that he erected a "For Sale" sign, about 2 feet by 10 inches wide, between the two lots near their front in 1923, which stated that he was the owner and gave his address and telephone number; that it was there both before and after the date of said judgment; that when, about two months before the trial (February 25, 1927) after an interval of about six months absence from the property, he found the sign had been removed he replaced it with another differing from the first only in that it did not have the words "For Sale", which still remains there; that while he knew the first sign was on the property before and after March 26, 1926, he could not say as to that particular day from personal knowledge because he was not there.

There was no attempt to refute such testimony or to show that the first sign was not there on the date of the rendition of the judgment or afterwards.

The decree found that appellee was at all times prior to

and since February 9, 1925, in the sole and exclusive possession of said lots, that appellant did not know of the record title in Cohoon prior to the entry of said judgment, or extend credit to Cohoon upon his apparent title to the premises, and that Cohoon obtained said warranty deed from appellee upon false and fraudulent representations as to his financial ability, and failed and refused to carry out said contract after repeated demands upon him to carry out the same.

Whether or not the payment of taxes would put one on inquiry we need not consider as it can hardly be questioned that the "For Sale" sign, standing conspicuously on the property both before and after the date of the judgment and so, in the absence of counterproof, presumably on the date of the judgment, constituted constructive notice that put the judgment creditor on inquiry as to the nature of appellee's claim of ownership, definitely asserted as it was on the sign itself, with full directions for acquiring full knowledge of such claim. The foundation of a building also gave notice that actual possession had been taken of the property. Surely such visible evidence of possession and claim of ownership was sufficient to put any subsequent claimant, whether by purchase or lien, on his guard and called for inquiry, which, if pursued under the directions on the sign itself, would have led to complete knowledge of appellee's equitable claim. "One having notice of such facts as would put a prudent man on inquiry is chargeable with the knowledge of other facts which he might have discovered on diligent inquiry." (German-American Bank v. Martin, 277 Ill. 629, 648; Blake v. Blake, 260 Ill. 70.) If the sign on the property did not alone indicate appellee's possession it must be so deemed when taken with visible evidence of improvements started on the

our since February 9, 1960, in the sole and indicative possession of said land, that appellant did not know of the record title in Gibson prior to the entry of said judgment, or valued credit to Gibson upon his apparent title to the premises, and that Gibson obtained said warranty deed from appellee upon false and fraudulent representations as to his financial ability, and failed and refused to carry out said contract after repeated demands upon him to carry out the same.

Whether or not the payment of money could put one on inquiry we need not consider as it can hardly be questioned that the "for sale" sign, standing conspicuously on the property long before and after the date of the judgment was so, in the absence of conclusiveness, presumably on the date of the judgment, constituted constructive notice that the judgment creditor claimed an interest in the nature of appellee's claim of ownership, sufficiently answered as it was on the sign itself, with full information for acquiring full knowledge of such claim. The foundation of a bona fide purchaser's defense of payment had been taken of the property. Merely such visible evidence of possession and claim of ownership was sufficient to put any subsequent claimant, whether by purchase or lien, on his guard and notice for inquiry, which, if pursued under the circumstances on the sign itself, would have led to complete knowledge of appellee's equitable claim. "The having notice of such facts as would put a prudent man on inquiry is chargeable with the knowledge of other facts which he might have discovered on diligent inquiry." [illegible] v. [illegible], 177 Ill. 221, 224; Eagle v. Emig, 18 Ill. 73.) If the sign on the property did not alone indicate appellee's possession it must be so coupled when taken with visible evidence of improvements which on the

property. It has been held that a "For Sale" sign on a fenced lot, giving the business address of the claimant's attorney, was sufficient proof of possession and ownership by one seeking to remove a cloud on his title. (Oles v. Davis, 210 Ill. 531.) The facts in the case at bar certainly have equal force.

It is unquestioned that under our statutes and numerous decisions of the Supreme Court a judgment creditor stands on the same footing as a subsequent purchaser. But the facts in the case at bar are such as would put either on inquiry. As said in the Martin case, supra, and Williams v. Brown, 14 Ill. 200, a purchaser is bound to inquire of the person in possession by what tenure he holds possession and what interest he claims in the premises. It can not be said, as claimed by appellant, that under such an open, visible notice of possessory right appellee was not in such possession as gave appellant knowledge thereof, or that regardless of such knowledge and appellee's equitable claim, appellant's lien is unassailable because the fee stood of record in Cohoon. Such continuous possession by appellee was inconsistent with the title of record and was sufficient in character to give constructive notice to all the world of the rights of the party in possession. (Atwood v. C. M. & St. P. Ry. Co., 313 Ill. 59, 62.)

Nor do we think appellee is estopped from asserting his claim by the delivery of the deed to Cohoon. True, as stated in 27 Ruling Case Law, 491, the authorities are not all in accord as to the effect of continued possession by a grantor as notice of rights inconsistent with his grant. But as stated in the text cited: "And his absolute deed divests the grantor of the right of possession as well as of the legal title, and when he is found in possession after delivery of his deed it is a fact inconsistent

with the legal effect of the deed, and is suggestive that he still retains some interest in the premises. Under such circumstances, a purchaser has no right 'to give controlling prominence to the legal effect of the deed,' in disregard of the other 'notorious antagonistic fact' that the grantor remains in possession just as if he had not conveyed."

The facts found in the decree are not questioned, and the conclusions therefrom we think are justified.

The decree will be affirmed.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

76 - 32014

JAMES B. McCLANE,
Appellant,

v.

I. MANSBACK and
BERNARD W. SHOW, Bailiff
of the Municipal Court
of Chicago,
Appellees.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is a bill to declare a judgment to be a cloud upon complainant's title to the premises in question, and to restrain enforcement of the judgment and to declare a sale under it void.

The bill as amended was dismissed for want of equity upon a general and special demurrer. It appears therefrom that Benjamin and Elizabeth Waters, husband and wife, occupied the premises as a homestead, and pending settlement of their marital difficulties, conveyed the same to one Jack White on January 4, 1926, by warranty deed, filed for record the following day, but that in fact he was to hold the title in trust until their marital difficulties were settled by decree in the wife's separate maintenance suit then pending; that he paid nothing for the conveyance and never took possession of the premises; that on May 13, 1926, while he so held title a judgment by confession in favor of defendant I. Mansback for $931.87 was entered in the municipal court against said White; that on June 30, 1926, said premises were sold pursuant to execution issued on the judgment and a levy on the premises; that on July 2, 1926, White conveyed

the premises by warranty deed to Benjamin and Elizabeth Waters, which was filed of record July 16, 1926; that on August 20, 1926, the judgment was reopened and permitted to stand as security only pending a hearing on its merits, which has not yet been had; that on October 28, 1926, said Benjamin and Elizabeth Waters conveyed the premises by warranty deed to complainant McClane, which has been recorded, and that on June 29, 1927, complainant, to prevent the issuance of a deed on the certificate of sale issued to defendant Mansback, deposited with the bailiff of the municipal court the requisite sum for the redemption of the property.

In the last analysis complainant's claim is predicated wholly upon the fact that when the judgment lien attached White held title to the premises not in fee simple, as appeared from the recorded instrument, but in fact in trust for Waters and his wife as their interests might appear after a decree of court in the separate maintenance suit. On that theory the bill asks that the judgment be declared not a lien against the premises, that the levy, sale and certificate thereof be set aside and declared null and void as against complainant as a cloud upon his title, that defendant Mansback be enjoined from receiving such deposit from the bailiff, and the bailiff from paying the same to him, and for such other and further relief in the premises as equity may require.

We fail to see wherein complainant is entitled to any equitable relief against defendants. There is no privity whatever between him and them except as to the deposit of the redemption money. He took title to the premises as shown of record October 28, 1926, with actual or constructive knowledge thereof. The chain of title as therein disclosed showed that his grantors

had formerly invested the fee in White, and that when White in turn conveyed the fee back to them the premises were encumbered with said judgment. If anybody was wronged by the judgment it was Waters or he and his wife. They seem to have accepted its validity, so far as the pleadings disclose, for they conveyed the premises to complainant, and complainant accepted the title without any reference to the existing judgment. While White in the meantime had the case reopened to put in a defense, presumably in the interest of Waters, complainant nevertheless took the title unconditionally with constructive, if not actual, knowledge that the judgment still stood as security, and that he bought a law suit. But he had no ground for complaining of the entry of said judgment.

Nor is there any charge of collusion or fraud in the entry of the judgment. It became a lien on the premises by statute and its validity was impliedly recognized in the subsequent conveyances. There is neither fraud, accident nor mistake pleaded that might have influenced complainant's acceptance of the title as it appeared of record. If any equities existed between Waters and White whereby the former might have had the judgment vacated, not only have they not been pleaded but we fail to see on what ground complainant, under the circumstances, could avail himself of them.

But he gets back his title by the redemption so made free from any cloud. There is none, therefore, to be removed. The deposit, too, was paid to the bailiff without any condition whatever, and the certificate recited that it was paid for the benefit of the purchaser. In Wenham v. Schmitt, 219 Ill. 185, 198, where there was a deposit with the sheriff for redemption and issuance of a like certificate of purchase, an order was

entered restraining the sheriff from paying over the redemption money until the determination of an appeal. The court said that such order did not in any manner affect the question whether there was a redemption. Here, as there, the statute with respect to redemption was complied with, and it was the right of the purchaser at the sale to receive the redemption money.

We think the bill was properly dismissed for want of equity and the decree will be affirmed.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

85 - 32025

GEORGE S. OLIVER and MABEL OLIVER, Appellees,	APPEAL FROM MUNICIPAL
v.	COURT OF CHICAGO.
LOUIS ZIMMERMAN, Appellant.	

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This purports to be an action in tort. The statement of claim charges that defendant Zimmerman and one Bowen, as to whom the case was later dismissed, embezzled and converted to their own use $500. The facts alleged are that defendant represented one Nannie Thomas who signed a contract with plaintiffs to purchase a certain piece of real estate, and that, "according to the terms of the contract" (without alleging it as a fact) she deposited $500, which by the contract was to be held by said Bowen for uses and purposes set forth in the contract (a copy of which is attached to the statement of claim); that subsequent to the signing of the contract plaintiffs demanded of Zimmerman and Bowen the $500 earnest money "deposited as set forth in the contract;" that Zimmerman admitted having received the same from Nannie Thomas and having delivered it to Bowen; that Bowen denies having received it from Zimmerman, and that both refused to pay the same on plaintiffs' demand; wherefore they are charged with embezzling and converting it to their own use. The affidavit of plaintiffs' claim sets forth that the nature thereof is for money converted by defendants for their own use in the sum of $500.

It is too obvious for comment that the statement of

claim does not present a case of tort. It not only fails to allege any legal duty by defendant to plaintiff or the violation of any, but it does not even charge that the sum was ever actually deposited. It merely alleges that it is so recited in the contract, and does not allege that defendant ever actually had it, but simply the evidenciary fact that he admitted receiving it, and then alleges that he delivered it to Bowen, the broker, as required by the contract, and yet charges him with embezzlement because the broker would not give it up on demand. No tortious conduct by defendant is stated either in the ultimate or the evidenciary facts pleaded, and hence no judgment for tort could stand on such a pleading. Had a motion in the nature of a demurrer been made it should have been sustained.

Defendant, however, filed an affidavit of merits denying receiving the money and went to trial before a jury, and while not even the evidence showed that he had ever received the money or that it had been deposited on the contract or that defendant had converted any sum to his own use, yet we need not consider its insufficiency to sustain the verdict, for no judgment in tort could stand on such a statement of claim. Accordingly the judgment must be reversed as a matter of law. (Gillman v. Chicago Nys. Co., 248 Ill. 505; Lawson v. Williams, 211 Ill. App. 248; McCarthy v. Morgan, 209 id. 244; Plew v. L. M. Board, 197 id. 408.)

REVERSED.

Gridley and Scanlan, JJ., concur.

94 - 32034

247 I.A. 633

FRED J. WILLIAMS,
Appellant,

v.

FRANCIS BAILEY,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in favor of defendant in an action to recover real estate commissions, tried by the court without a jury. The statement of claim is to the effect that defendant agreed and promised to pay plaintiff the sum of $2000 upon the closing of a deal and the consummation of a contract for exchange of properties, that the deal was consummated by an exchange of deeds, and that defendant has not complied with the promise.

The affidavit of merits denies that any amount is due from defendant, and sets up that plaintiff and defendant were at the time interested in another real estate transaction involving certain property on South Park avenue, Chicago, for which plaintiff was to find a buyer on certain terms, requiring $7,500 to be paid in cash, to be divided between them, and that it was agreed that plaintiff was to receive such commission as he might be entitled to under the contract in question only in case he procured a buyer for said South Park avenue property, and that he did not procure a sale of the South Park avenue property and never became entitled to the commission.

We have carefully reviewed the evidence heard on the issues so formed and cannot say that the court's finding was

manifestly against its weight. Reaching that conclusion it would subserve no useful purpose to detail the evidence. While the respective versions of the parties as to the oral understanding are in irreconcilable conflict, there was evidence of disinterested witnesses tending to corroborate defendant's. We think it fairly inferable from the entire testimony that while the amount of the commission was agreed upon it was to be paid out of cash proceeds from, and only in case of, a sale of the South Park avenue property to be effected by plaintiff according to terms agreed upon between them. Plaintiff never effected such sale and never brought this suit until other differences and litigation arose between the parties. His right to a commission was contingent on his effecting the sale of the South Park avenue property, and this arrangement seems to have been made because defendant was not to get any cash under the terms of the contract for exchange, on which plaintiff claims commissions. There being circumstances and corroborative testimony tending to establish defendant's, rather than plaintiff's, version of the arrangement between them we think the finding was in accordance with the preponderance of the evidence.

Besides, it appears from the record that certain interrogatories and answers thereto were filed by appellant pursuant to section 32 of the Municipal Court Act and were admitted in evidence and considered by the court in arriving at its decision. They not having been preserved in a bill of exceptions, the legal presumption is they would support the finding and judgment.

The contention that the court admitted improper evidence presents no ground for reversal, when as here the

record shows there was competent testimony to sustain the finding of the court. (Palmer v. Meriden Britannia Co., 188 Ill. 508.)

Appellant asks us to review alleged errors in rulings on the propositions of law submitted, but the abstract does not indicate in any way what they were. "It is thoroughly settled that everything upon which error is assigned must appear in the abstract." (Lanyon v. Michigan Buggy Co., 94 Ill. App. 243, 247.) Propositions of law serve the same purpose as instructions of similar import would serve had the case been tried by a jury (Village of Park Ridge v. Robinson, 198 Ill. 571, 579), and it is a settled rule that assignments of error upon rulings on instructions will not be reviewed unless the instructions are incorporated in the abstract. (People v. Neil, 243 Ill. 208, 214.)

Nor, the case being tried without a jury, did plaintiff's motion for a new trial serve any purpose whatever in preserving questions for review. (Climax Tag Co. v. American Tag Co., 234 Ill. 179, 182.)

Not being able to say that the finding and judgment are manifestly against the weight of the evidence, under the well established practice of this court, the judgment will be affirmed.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

111 - 32061

247 I.A. 633

CHARLES E. PETERS, for the use of DENNIS J. EGAN, Bailiff, etc., Appellant,	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
v.	
LOGAN SQUARE TRUST & SAVINGS BANK, a corporation, et al., Appellees.	

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal brings up for consideration the sufficiency of a general demurrer to each of defendant's special pleas, the identical question decided on a former appeal by the defendant bank, in this same case, in which we filed an opinion October 6, 1925, reversing a judgment entered for plaintiff on the court's sustaining such general demurrers. (See Case No. 29788, 238 Ill. App. 628, opinion unpublished.)

On the cause being remanded and reinstated said demurrers in accordance with the mandate were overruled, whereupon plaintiff stood by the same, and judgment for one cent damages was entered for defendant. And now plaintiff appeals, thus presenting the same question again.

As we are bound by our former decision and therefore cannot again consider the case on the same points decided, it is unnecessary to state the arguments for reversal or the grounds of our former decision. It is sufficient to refer to the opinion and say that the points raised on this appeal are such as were or could have been presented on the former appeal, and, therefore, nothing remains to be done but to affirm the judgment entered in accordance with our former opinion.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

122 - 32063

247 I.A.

W. E. BAYFIELD,
Appellee,

v.

W. E. DEPENBACHER,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

In this action defendant moved to dismiss plaintiff's statement of claim as not stating a cause of action. The motion was denied. He then filed his affidavit of merits, which was stricken on plaintiff's motion in the nature of a demurrer. Defendant having elected to stand by his pleading, judgment was entered against him as by default for $6,000, from which he appeals.

Plaintiff apparently attempted to state a cause of action for money had and received. As we view his pleading it does not state such a cause of action at common law or one under the rules of the Municipal Court.

It begins by stating that the claim is for money had and received, without stating it was for plaintiff's use, or the necessary elements of such a cause of action or ultimate facts that give rise to it. The claim is manifestly predicated upon what is pleaded as an evidenciary fact instead of an ultimate fact, namely, an alleged instrument in writing.

The ultimate facts pleaded on which the claim rests are to the effect that on November 15, 1924, defendant proposed to sell to plaintiff capital stock of a certain corporation;

and that the case should either be tried upon the issues the parties tried to raise or on reformed pleadings properly presenting them. No one would undertake to say that plaintiff's pleading would stand on demurrer under common law practice, and whether under the liberal form of pleadings in the municipal court it may stand, it accords more with justice and the equitable form of action of money had and received that the issues be so formed as to present either a clear question of law or plain issuable questions of fact.

REVERSED AND REMANDED.

Gridley and Scanlan, JJ., concur.

the

pleading in effect that the same was paid in consideration of an option given plaintiff to buy the stock, and that the $5,000 was to be applied on the purchase only in the event of a consummation of the purchase.

If there be defects in defendant's pleading they are such as followed on compulsion to plead to a defective statement of claim in compliance with the rules of said court. Possibly had a trial been had on the issues formed by the affidavit of merits, the finding or verdict, (as it may have been) would have cured its defects. But that question is not before us.

Nor, in the shape of the pleadings, are we called on to construe the alleged instrument or to say whether it is so ambiguous that on a hearing extrinsic facts might not be admissible to show the actual intention of the parties.

Inasmuch as defendant has raised certain issues by his pleading proper for determination if the statement of claim is to stand, we merely decide that such statement is not in such form as precluded defendant from pleading as one of said issues that the money was paid as consideration for an option to purchase said stock and was to be applied on the purchase price only in case the option was accepted. In the form in which plaintiff has pleaded his cause of action we think that issue was properly taken.

Plaintiff's entire claim rests upon his construction of said agreement without properly presenting the same for construction, and the defense evidently is one based upon a different construction or different state of facts. In other words, we think it was error to enter judgment as by default

that he paid defendant on account of the purchase price $5,000; that on December 7, 1924, plaintiff elected not to accept said proposal and has made demand for the return of the money and the defendant has refused to pay the same. A proposal may in fact be an option. It depends on the ultimate facts pleaded. Here they are insufficient to determine. The instrument is not declared upon but is merely referred to as evidencing the terms of the proposal and the acknowledgment of the receipt of the money. But neither such recital nor the ultimate facts pleaded are such as bring the instrument before the court for construction.

Plaintiff's argument, however, is based upon his construction of the instrument. But in the absence of direct averments of ultimate facts that involve its construction the pleading in legal effect is the same as if no reference had been made to it. Eliminating the evidentiary facts from consideration, on which issue need not be taken (Matthiessen v. Huntley, 307 Ill. 36), the pleading does not set forth sufficient facts to support a cause of action for money had and received by the defendant for the use of the plaintiff. An action for money had and received lies only for money which, ex equo et bono, the defendant ought to refund. But in the absence of an allegation that the money was had and received for the use of the plaintiff, or of an express promise to return it, or of a state of facts from which the law implies such a promise, the ultimate facts pleaded do not bring the case within the scope of such an action.

But if it could be said upon the most liberal construction of the pleading that a prima facie case was stated, then certainly defendant had a right to take issue, as he did, in denying that he paid the money "on account of the purchase price," and in

137 - 32078

LOUIS KANTER, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
SAM ZUCKERMAN, Appellant.	

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff alleged in his statement of claim that defendant agreed to pay him a commission of 7½ per cent on the sale price of all goods he sold, amounting to $38,000 during the period of his employment, and that deducting payments on account there was still due and owing to him $1,887.

Defendant denied an agreement to pay a commission of 7½ per cent, or that plaintiff secured orders totaling $38,000, or that he was entitled to the sum claimed, and alleged that he had been paid in full pursuant to a verbal agreement between them for a commission of 5 per cent on the amount of net sales of goods sold, delivered and paid for, less 8 per cent trade discounts and deductions for bad debts, and that plaintiff was overdrawn to the amount of $203.29, for which defendant made claim. On these issues the case was tried by the court without a jury, resulting in a finding and judgment for plaintiff in the sum of $1,0[illegible]8.22. This appeal followed.

The first question before the court was, what was the agreement? On this the parties differed in their testimony, each contending that it was as he had pleaded. Plaintiff's testimony, however, had corroboration by another witness who testified that while plaintiff was so employed he, too, went to Zuckerman for

employment as salesman, and in discussing the terms Luckerman said he would pay him a commission of 7½ per cent on gross sales, the same as he was paying plaintiff. There was no corroboration of defendant.

Plaintiff's proof of the amount of sales was from a statement thereof furnished to him by defendant, on request therefor, and defendant practically admitted the statement referred to was given to plaintiff on his request to know how much business he did and how much defendant owed him, and defendant's bookkeeper testified that the statement was drawn up from defendant's ledger kept by him in which the monthly postings and totals were made.

In defense defendant offered in evidence a sales summary covering the period of employment, claimed to have been made by said bookkeeper from the sales invoices that were kept bound up in books from which he made transfers to the general ledger. The court sustained objection to its introduction. There was no showing that the original books and invoices could not be produced or that they were too voluminous to be brought into court. In the absence of other proof the court took as a basis for the sales the statement as furnished by defendant to plaintiff but allowed deductions for returned goods in accordance with defendant's claim, leaving as a balance due the amount of the judgment.

On such evidence appellant's contention that the findings was against its weight cannot be reasonably maintained.

Nor is the point well taken that the court erred in excluding the summary statement by the bookkeeper offered by defendant in the absence of producing the original books or sales slips, or a showing that they could not conveniently be produced. (Welsh

v. Shumway, 232 Ill. 54; People v. Hawhill, [illegible] Ill. 393, 403; Hochschild v. Goddard Fuel Co., 233 Ill. App. 36, 39.)

There was no room in this case for evidence of a general usage or custom. Both parties claimed an express agreement, and as each offered evidence to support it, the court was left to determine from the most credible evidence what it was. We cannot say its finding was manifestly against the weight of the evidence, and no good grounds for a reversal of the judgment being presented, it will be sustained.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

247 I.A. 693

146 - 32087

L. B. WEYBURN, Appellee, v. HOME SEEKERS' REALTY CO., a corp., HOLLYWOOD LAND & WATER CO., a corp., and HOLLYWOOD REALTY CO., a corp., Appellants.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

Plaintiff brought this suit against the three corporations named as defendants claiming a five per cent commission on an alleged sale of real estate for and on their behalf amounting to $11,000 and their agreement to pay the same.

An affidavit of claim was filed in behalf of each defendant denying any such indebtedness. The affidavits of two of them denied making any such agreement, or that plaintiff was ever employed by them or rendered any services for them. The affidavit of the third defendant, Hollywood Realty Co., admitted plaintiff undertook to sell real estate for it under an employment, that no commissions would be earned unless upon an initial payment, and alleged that none was made on the sale in question; and further, that a commission depended on further payments on said alleged sale.

On a hearing without a jury there was a finding and a joint judgment against the defendants for $550 from which this appeal is taken.

Plaintiff was his only witness.

As evidence of the alleged sale to one Janet Osbaldeston he introduced a "deposit receipt" on a printed form, dated at Florida, 12-27-1925. Said receipt acknowledged the receipt from her of $2,750 "as part payment on account" of the purchase of a certain lot in Hollywood, Florida, the full purchase price to be $11,000, the balance to be evidenced by four notes of equal amount due respectively in 6, 12, 18 and 24 months, all secured by mortgage on the premises. It then read as follows:

> "The above is subject to acceptance of the Home Office by the General Manager of the Official Resale Department of the Hollywood Land & Water Company and the Home Seekers' Realty Company, agents of the seller.
>
> Official Resale Department of the Hollywood Land & Water Company and the Home Seekers Realty Company.
>
> By L. B. Weyburn.
>
> As agent for the seller, we hereby accept the above:
>
> Official Resale Department of the Hollywood Land & Water Company and the Homeseekers Realty Company.
>
> By R. T. May.
>
> The terms and conditions hereof are hereby approved:
>
> Janet Obaldeston,
>
> Purchaser."

Plaintiff then testified to the delivery of the check to him, and by him to said May, and by the latter to one Whitson, manager of said "Resale Department"; that he was later told by Whitson that he gave the check back.

He further testified that he was salesman for "the company," without stating what company, and that he was to receive five per cent commission on all contracts "consummated"; that when the full cash consideration in a particular deal was paid, that is, "the initial payment and the settlement of the balance by mortgages," his commission became due and payable. There was no proof, however, that any note or mortgage was executed. He also testified that he did not know whether the purchaser was at the

time ready, able and willing to purchase the lots. All he knew was she tendered the check.

According to his own testimony there was insufficient proof that he was entitled to a commission. The action, too, is one ex contractu. There was no attempt to show any liability whatever on the part of the Hollywood Realty Company. A joint judgment, therefore, could not stand even if the claim had been established against the other two defendants. In such an action the judgment must be against all or none. This is fundamental. If there is no basis for a judgment against one of the defendants it cannot stand against the other two without a dismissal as to that one.

It appears that there was a stipulation between the parties that the depositions of certain witnesses should be taken in Florida on a certain date upon oral interrogatories, and that they should be read upon the trial of the cause with the same effect, subject to the same objections, as if taken in pursuance of a dedimus. The depositions of the witnesses named were taken as stipulated and offered in evidence by defendants. Upon a general objection they were rejected by the court. The ground of the ruling is not apparent.

Appellee urges that they were not competent because they tended to show a variation of the written contract as evidenced by said deposit receipt. The depositions were to the effect that the delivery of the deposit receipt was not intended to take effect unless the purchaser was released from another contract of purchase from a third party, and that he refusing to release her the deposit check was returned. That evidence was competent. (Bell v. McDonald, 308 Ill. 329, 336.) They were also

admissible to show that plaintiff had no contract whatever with the defendants but that his contract was with a certain partnership composed of certain named individuals carried on under the name by which the deposit receipt was signed. They were competent to establish the defense that plaintiff's contract was not with defendants, and also that the purchase depended on a future contingency that never occurred.

But inasmuch as by plaintiff's own testimony he was to consummate an arrangement to pay the balance of the purchase price by having notes and a mortgage to secure the same executed by the purchaser before he would be entitled to a commission and there was no evidence or pretense that that was done, and as there was no evidence tending to show a joint liability, the judgment must be reversed.

REVERSED.

Gridley and Scanlan, JJ., concur.

247 I.A. 634

167 - 32108

JOEL G. CARLSON,
Appellant,

v.

FRANK G. RATHJE et al.,
Appellees.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

At the close of the evidence in this case, heard by the court without a jury, the court remarked - apparently without waiting for argument on the merits of the case - "after a consideration of all the evidence heard I am not able to say that the evidence preponderates in favor of plaintiff." Thereupon plaintiff moved for a nonsuit. After some discussion as to whether the motion was presented in time the court continued the motion to a later date, saying, "I will enter a finding for the defendant," which was then done.

The question thus presented is, did the court state its finding before the motion, as is required to be done by section 30 of the Municipal Court Act to deprive plaintiff of the benefit of his motion. We think it clear that it did not. Not until the court made the last quoted remark did it definitely state a finding. The prior remark, after which the motion was made, merely indicated its state of mind. It is said in Ruling Case Law, Vol. 8, p. 195, sec. 6, that a "mere intimation by the court as to what its judgment will be has been held not such an announcement of a finding as will preclude a plaintiff's right to take a dismissal." This statement of the law is in harmony

with the decisions of this court on the subject. (Daube v. Kuppenheimer, 195 Ill. App. 99; Kilroy v. Justrite Mfg. Co., 209 id. 499; Am. Shipping Co. v. Henderson, 216 id. 175; Wm. F. R. R. v. Fast. Master Dispatch Co., 230 id. 438.) Plaintiff having made his motion before the court made a definite finding the motion should have been allowed.

Accordingly the judgment must be reversed and the cause remanded with directions to allow the motion and dismiss the suit.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley and Scanlan, JJ., concur.

with the decisions of this court on the subject. Cloude v. Bayonne, 147 (1) 432, 433; Ellis v. [illegible] 102 Id. 499; Mc. Ritchie Co. v. Kuykendall, 142 Id. 1; Ryan v. [illegible] 7 P. R. 4; [illegible] 1917 having made his motion before the court, made a motion finding the motion should have been allowed.

Accordingly the judgment must be reversed and the cause remanded with directions to allow the motion and dismiss the suit.

ENTERED ON CONCLUSION OF [illegible]

ENTERED ON [illegible] 1[illegible]

46 - 31980

CHARLES H. PERRIGO, Appellee,	)	APPEAL FROM CIRCUIT COURT,
v.	)	COOK COUNTY.
CHARLES A. COEY, Appellant.	)	

MR. JUSTICE GRILLEY DELIVERED THE OPINION OF THE COURT.

On November 20, 1925, plaintiff caused a judgment by confession for $2301.59 (of which $155 was for attorney's fees) to be entered against the defendant, Charles A. Coey, upon a note for $2600, dated Chicago, December 31, 1920. The note is signed by the Templar Motor Co., by Coey, its president, and by Coey individually. It reads that "on demand after date, for value received, I, we, or either of us, promise to pay to the order of C. H. Perrigo twenty-six hundred dollars, at 1840 S. Michigan Ave., Chicago, * * with interest after date at 18%, and after maturity at 7%." Above the signatures is the clause: "And to secure the payment of said amount, I, we, or either of us hereby authorize any attorney of any court of record to appear for me or us, in such court, in term time or vacation, at any time hereafter, and confess judgment without process in favor of the holder of this note, for such amount as may appear to be unpaid thereon, together with costs and reasonable attorney's fees, and to waive and release all errors," etc., "hereby ratifying," etc. On the back of the note is written the following: "Aug. 18, 1921. Credit the within note with $899.31, due from United States Mortgage Co. to the Templar Motor Co." (Signed) "C. H. Perrigo," and also "Templar Motor Co., by C. A. Coey, Pres." In plaintiff's

declaration, in the usual form, it is alleged that on the amount of the note, plus 7% interest, "defendant is entitled to a credit of $1013.21."

On December 7, 1926, within the same term of court, Cocy appeared and moved that the judgment be opened and he be given leave to plead, etc., supporting the motion by his affidavit. After a hearing the court ordered that the judgment be opened, etc., and thereafter Cocy filed a plea of the general issue, and also four special pleas, entitled (1) want of consideration, (2) in bar, (3) lack of jurisdiction, and (4) payment. Plaintiff's demurrers to the special pleas were sustained, and in April, 1927, there was a trial before a jury on the issues made by plaintiff's declaration and Cocy's plea of the general issue. The jury returned a verdict for $1808.93 in plaintiff's favor, and on April 23, 1927, judgment was entered thereon against Cocy, and he appealed.

On the trial the note was admitted in evidence. Plaintiff testified that about the day of its date Cocy solicited a loan from him, and he delivered his check for $2600, payable to Cocy's order (which check subsequently was cashed) and at the same time Cocy delivered to him the note, written out by Cocy, and signed by the Templar Motor Co., and Cocy, individually, as shown; that plaintiff objected to the "18 per cent interest" before maturity, saying that it was not legal, and thereupon it verbally was agreed that interest should run at the rate of 7 per cent from date; that he is now only claiming interest at that rate; that in August, 1921, he demanded of Cocy the payment of the note and accrued interest; that Cocy said he had no money but that he had a "due bill" of the United States Mortgage Co., owing to the Templar Motor Co. for $899.31, which could easily be collected; that thereupon the Motor Co., by Cocy, assigned the due bill to him and he (plaintiff)

document, in the usual form, it is silent as to any amount of the note, plus 7% interest, "coupons to mature in a period of 1885-1895."

On January 7, 1895, while the case was still on motion, counsel appeared and moved that the judgment be vacated and be given leave to plead, etc., supporting the motion by his affidavit. After a hearing the court ordered that the judgment be opened, etc., and thereupon Cory filed a plea of the general issue, and also two special pleas, entitled (1) plea of consideration, (2) in bar, (3) lack of jurisdiction, and (4) payment. Plaintiff's counsel to the special pleas were sustained, and in April, 1895, there was a trial before a jury on the issues made by plaintiff's instructions and Cory's plea of the general issue. The jury returned a verdict for $1808.92 in plaintiff's favor, and on April 9th, judgment was entered thereon pursuant thereto, and on appeal.

On the trial the plaintiff's evidence, consisting principally of testimony of the day of the case only, indicates a loan made, and he delivered his check for $1800, payable to Cory's order (which check subsequently was endorsed) and on the same day Cory delivered to him the note, retained out of Cory, and signed by the Central Coal Co., and Cory, individually, as makers (the notes will objection to the "7% per annum interest" being mentioned, saying that it was not legal, and therefore it certainly was against the interest should run at the rate of 7 per cent after June 1st in no only claiming interest at that rate in suit. Still, he demanded of Cory the payment of the note and received satisfaction that Cory gave him and no money was ever paid to the "Cory" of the Central Coal Co., under it. The Cory [illegible] for [illegible], which small amount [illegible] Motor Co., by Cory, [illegible] (particular)

signed said credit endorsement on the note and Doey signed underneath "Templar Motor Co., by C. A. Doey, Pres."; and that he (plaintiff) never received any money or anything of value from the United States Mortgage Co., by reason of the assignment of the due bill.

The defendant was the only witness in his behalf. Certain memoranda and writings were introduced by him. He admitted receiving the $2600 and signing the note. He testified that the money was used solely in the automobile business of the Motor Co., of which he was president; that he was well acquainted with plaintiff, who at one time had been an employee of the Motor Co.; that in August, 1921, when said credit endorsement was placed upon the note, plaintiff agreed to accept the due bill as a part payment to the extent of $899.31; that in the year 1923 the Motor Co. became insolvent and one Jacob Goldman was appointed receiver of all its assets and took possession; that included in these assets were certain automobile parts, of the claimed value of about $4,000; that, although he paid nothing therefor to the receiver, the latter allowed him to take them away; and that about July, 1923, he delivered certain of them, of the claimed value of about $3,000, to plaintiff, who agreed to accept them in full payment of the balance due upon the note and to cancel and return the note, and who took possession of said parts but did not return the note.

In rebuttal, plaintiff testified that some time during 1923 defendant asked permission to store in plaintiff's shed or basement certain automobile parts, some of which were old and rusty, and the same were so stored; that subsequently defendant suggested that plaintiff try and sell some of the parts and plaintiff agreed to do so and did thereafter sell some of them for defendant; that the title to and ownership of them was always in defendant; that nothing ever was said as to plaintiff

claimed said credit memorandum on the grounds that a certain memorandum "Tempfar Motor Co., by T. L. Clark, Pres." was in (plaintiff) never received any money or anything of value from the United States Motors Co., by reason of the assignment of the due bill.

The defendant and the only witness in his behalf, certain memoranda and writings were introduced by him, in relating transactions the DATOT and signing the note. He testified that his money was solely in the automobile business of the plaintiff, and that he was prevented; that he was well acquainted with plaintiff, and at one time had been an employee of the Motor Co.; that in August, 1921, when only credit endorsement was placed upon the note, plaintiff agreed to accept the due bill as a part payment to the extent of $[illegible]; that in the year 1920 the Motor Co. became insolvent and one Jacob Dallmann was appointed receiver of all its assets and transactions; that included in these assets were certain automobile grills, at the claimed value of about $[illegible], although in fact [illegible] director in the receiver, the Union Alloys Co. [illegible] and that about July, 1922, he discovered [illegible] claimed value of about $[illegible], to plaintiff, who agreed to accept them in full payment of the balance due upon the note, if [illegible] return the note, and the back guarantee of [illegible] and that [illegible] the note.

In rebuttal, plaintiff testified that [illegible] 1920 defendant asked permission to store in plaintiff's shed or basement certain automobile grills, some of which [illegible] year, and the same were so stored [illegible] suggestive that plaintiff try and sell them if the price was [illegible] plaintiff agreed to do so and did [illegible] for defendant; that the title to said merchandise at time was always in defendant; that nothing ever was said as to plaintiff

accepting any of them in full settlement of the indebtedness evidenced by the note and plaintiff never agreed so to do; that after some of them, stored with plaintiff, had either been sold by plaintiff for defendant's account or had been taken away by defendant, plaintiff notified defendant to remove from his premises all remaining parts as plaintiff needed the space; that defendant did not remove them; and that, thereafter, plaintiff stored them with a storage company in defendant's name. It is probable that a part of the credit of $1013.21, mentioned in plaintiff's declaration, related to certain automobile parts which plaintiff sold for defendant's account.

It further appeared from plaintiff's evidence in rebuttal that about one month before the judgment was confessed plaintiff placed his claim against defendant in the hands of a firm of attorneys for collection. On October 23, 1923, defendant wrote said firm as follows: "If Mr. Ferrigo will send me a list of credits for payments made on this note, I will send him the balance due him." This letter of defendant is wholly at variance with his claim and testimony upon the trial to the effect that when, in 1922 or 1923, he delivered said automobile parts to plaintiff, it was agreed that plaintiff would accept same in full settlement and discharge of the balance due upon the note, and the letter strongly corroborates plaintiff's testimony that no such agreement ever was made.

Among the grounds for reversal, urged by defendant's counsel, are, that the verdict is contrary to the law and the evidence, and that, at least, it is excessive. We cannot agree. Counsel argues that the credit of $800.31 on the back of the note, as well as the credit of $1013.21, mentioned in plaintiff's declaration, "were ignored by the jury." That they were allowed

is reasonably certain. The items aggregate $1912.52. The face of the note is $2600, and the interest thereon at 7 per cent from the date of the note to the trial in April, 1927, amounts to about $1140, or $3740 for the face of the note and interest. Deducting from said sum of $3740 the total of the two credits mentioned, $1912.52, there remains a sum slightly larger than the verdict returned.

Counsel also contends that the court erred in sustaining plaintiff's demurrers to defendant's special pleas. Again we cannot agree. In the plea entitled "want of consideration" defendant alleged that "while it is true that defendant signed the note individually, he did so in the nature of a guarantor or surety and not as an original maker." The note on its face showed that he was one of the original makers. Furthermore, if the plea as filed was technically a proper one, the uncontradicted evidence disclosed that the consideration for the note was money loaned to defendant, to the amount of $2600, which defendant actually received before he delivered the note, and defendant could not have been prejudiced by the court's ruling on the demurrer. In the 2nd and 3rd special pleas, entitled "in bar" and "lack of jurisdiction," it is alleged that the court was without power, on a joint note signed by defendant and also by the Complex Motor Co., to confess a judgment against defendant alone. But, it will be noticed that the makers of the note, in the judgment clause, authorized any attorney of any court of record to confess a judgment against <u>either</u> or both of them, etc. Under such authorization the entry of a judgment by confession against defendant alone was proper. (<u>Little</u> v. <u>Ayer</u>, 35 Ill. App. 83, 87; <u>Knox</u> v. <u>Sinaloa Savings Bank</u>, 57 Ill. 330, 333; <u>Harris Trust & Savings Bank</u> v. <u>Neighbors</u>, 222 Ill. App. 201, 203.) Furthermore, the confessed judgment was opened and the cause proceeded as if originally commenced by

is reasonably certain. The time [illegible] of the note is [illegible], and the interest thereon at 7 per cent from the date of the note to the trial is [illegible], [illegible] $1140, or $2460 for the face of the note and interest. Deducting from this sum of $2460 the total of the six credits [illegible] $1810.50, there remains a sum slightly larger than the counterclaim.

Counsel also contends that the lower court, by [illegible] plaintiff's demurrer to defendant's special plea, [illegible] cannot agree. In the plea sustained "such [illegible] defendant alleged that "while it is true that [illegible] the note individually, he did so in the capacity of a [illegible] surety and not as an original maker." The suit on the [illegible] that he was one of the original makers. Furthermore, if the plea [illegible] he did not [illegible] a proper one. [illegible] distinct [illegible] the consideration for the note was [illegible] defendant, in the amount of $[illegible], which [illegible] before he delivered the note, and [illegible] verification by the court's ruling on the demurrer. In the [illegible] the special plea, omitting the [illegible] it is alleged that the court was [illegible] a joint [illegible] signed by defendant and also by the [illegible] a judgment against defendant alone. [illegible] the amount of the note, in the judgment [illegible] authority of any court of record to [illegible] either on [illegible] of a judgment by [illegible] (Little v. [illegible], [illegible] [illegible], 97 Ill. App. 620, [illegible]; [illegible] 2 Ill. App. 509, [illegible]). [illegible] opened and the [illegible]

summons against defendant alone, and, under the statute, it was not necessary that the Motor Co. be joined as a co-defendant. (Cahill's Stat. 1927, Chap. 96, Sec. 6, p. 1733.) The demurrer to the 4th special plea, entitled "payment," was properly sustained. The payments claimed to have been made could be shown under defendant's plea of the general issue, and the sustaining of the demurrer to the special plea of payment did not prejudice defendant. (Benes v. Bankers Life Ins. Co., 282 Ill. 436, 442; Mosher v. Rogers, 117 id. 446, 451.)

Counsel also contends that the court erred in refusing to give certain instructions offered by defendant and in giving certain instructions offered by plaintiff. We have examined the refused and given instructions and do not think that the court committed any prejudicial error in this regard. The jury were fully and fairly instructed. Nor do we think that the court erred in its rulings on the admission and rejection of certain offered evidence, as claimed.

Finding no reversible error in the record the judgment of the circuit court is affirmed.

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

70 - 32008

STANLEY L. FABIONAS, doing business as S. L. Fabionas Co., Defendant in Error,

v.

JOHN CUKIS, Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a fourth class action in contract to recover $700 as commissions as a real estate broker there was a verdict and judgment for that amount against defendant. The main contention in this appellate court is that the verdict is manifestly against the weight of the evidence and contrary to the law.

The following facts in substance were disclosed upon the trial: Plaintiff was a licensed real estate broker in Chicago, and had been engaged in that business for more than 10 years, and one Macuikas was a licensed real estate salesman in his employ. Defendant was a builder of flat buildings which after erection were to be sold. Sometimes he built them on land which he owned and sometimes on land owned by others. In the summer of 1924, defendant was erecting for his cousin, Jonas Kukes, on premises known as 6408-10 South Rockwell street, Chicago, a four-flat building, and Kukes had given him authority to contract for the sale of the property for $30,000 or less. Prior thereto plaintiff frequently had acted as defendant's broker in negotiating sales of flat buildings and in the spring of 1924 had consummated a sale for defendant of his two-flat building on Maplewood Avenue, Chicago. On June 10, 1924, while said four-flat building was in process of erection, defendant called on plaintiff at his office

and said that he desired him to endeavor to sell the property for $30,000, but that he would consider a less amount. It was agreed that if plaintiff brought about a sale he was to receive commissions at the customary rate of 3 per cent. The details as to the property were listed as of that date on one of plaintiff's cards (introduced in evidence), and plaintiff instructed his salesman, Macuikas, and other salesmen, to use their best endeavors to consummate a sale. About August 10, 1924, Macuikas first showed the property to one Youraska, a prospective purchaser, who then for the first time met defendant. Youraska expressed himself as pleased with the property and there was some talk as to price and terms, but Youraska said that he wanted to wait before making any deal until the building was more fully completed. About two weeks later Macuikas again took Youraska to the building and further negotiations were had with defendant, which resulted in a verbal agreement as to price and terms. Youraska, however, then refused to sign a written contract of purchase, saying that he preferred to wait a week or so until the inside woodwork was finished, and it was agreed that final negotiations be postponed until that time. Thereafter Youraska and wife made frequent visits to the building where they had talks with defendant and also one Stanley, a salesman of another broker, named Mackiewich. The result of these meetings was that on August 29, 1924, without notice to plaintiff or Macuikas and without their knowledge, a written contract in the usual form, drafted by Mackiewich, was signed in his office by Youraska and wife and defendant, wherein the Youraskas agreed upon certain stated terms to purchase the property for $29,500. Youraska at the time paid $1,000 down as earnest money and thereafter a deed was delivered to him, signed by Kukes, and the contract was consummated. In the meantime, early in September, 1924, Macuikas went to the building and found that

said inside woodwork was completed. Upon his saying to defendant that he would "bring Tsuraska and make a contract" defendant informed him that Tsuraska had already signed a contract of purchase, and further said that he would not pay any commissions. Subsequently, plaintiff called on defendant and demanded payment of commissions, but the latter said he would not pay any commissions "because he had sold the property himself." Shortly thereafter the present action was commenced.

Defendant, in his affidavit of merits, stated as defenses inter alia that he did not request plaintiff to find a purchaser for the property and did not list the same with plaintiff; that plaintiff did not introduce to him the man who purchased the property; and that he was not the owner thereof and did not sign any contract on behalf of the owner. On the trial, being called by plaintiff as a witness under section 33 of the Municipal Court Act, he testified to the same effect. After Macuikas and other of plaintiff's witnesses had testified, and it appeared that defendant had requested plaintiff to find a purchaser and had listed the property in his office, and that Macuikas had first presented Tsuraska to defendant as a probable purchaser (as admitted by Tsuraska) defendant changed the theory of his defense, claiming, in effect, that plaintiff and Macuikas had abandoned their efforts and were not the procuring cause of the sale, and that another broker, Stanley, had consummated the transaction. On these points the testimony of defendant and of Stanley was unconvincing. There was no evidence of abandonment of the negotiations on the part of Macuikas.

The entire transcript shows an attempt on the part of defendant to avoid paying the just commissions of plaintiff, whose efforts and those of his salesman, Macuikas, were really the procuring cause of the sale. Whether defendant's actions

amounted to fraud or unfair dealing on his part towards plaintiff was the main issue which the jury were called upon to decide and we are not disposed to disturb their verdict, which is supported by the evidence and is in accord with the law. It has several times been decided by our Supreme Court, that, where a real estate broker begins negotiations for the sale of property for his principal which are carried on to a final sale, he cannot be deprived of his right to commissions because the principal completes the negotiations himself or through another party. (Rigdon v. More, 226 Ill. 382,387; Hafner v. Herron, 165 id. 242, 246.) In Day v. Porter, 161 Ill. 235, 237, it is said "that a broker, unless wrongfully prevented by his principal, must bring about an agreement in order to be entitled to his commission, and that the principal may employ several brokers to sell the same property, and may sell to the buyer who is first procured by any of them, without being called upon to decide which of the brokers was the primary cause of the sale, provided he remains neutral between them and is not guilty of any wrong." The evidence in the present case shows, as said in the Day case, that "defendant was not neutral or fair as between the brokers." (See, also, Hart v. Ehrhardt, 177 Ill. App. 145, 148.)

And there is no merit in counsels' further contention that the court erroneously refused to allow defendant's witness, Yourasko, to answer a certain question. The question as framed by defendant's attorney was clearly an improper one. The court, however, stated that if the question was put in different form he would direct the witness to answer it. Defendant's attorney did not see fit to adopt the court's suggestion. The court committed no error.

The judgment of the Municipal Court should be affirmed, and it is so ordered.

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

88 - 32028

THE NATIONAL CASH REGISTER COMPANY, a corporation, etc., Appellant,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
GUST. STOYAS, trading as Stoyas Bros., Appellee.	

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff commenced a replevin suit to recover the possession of seven cash registers which, as claimed, defendant unlawfully detained. Under an alias writ the bailiff took four of the registers on May 12, 1927, and delivered them to plaintiff. On June 29, 1927, a trial was had without a jury, resulting in the court finding the right to possession of the four registers to be in defendant, and adjudging that he recover possession, and that a writ of retorno habendo issue. Plaintiff appealed.

It appears from the evidence that defendant purchased the seven registers from plaintiff and on August 15, 1924, executed and delivered his note, wherein he promised to pay to plaintiff's order $1549.75, in 31 monthly payments, - 30 of them being for $50 each, due respectively on the 15th day of each succeeding month, and one for $49.75, due on March 15, 1927. The note was secured by a chattel mortgage on the registers, of even date and duly executed by defendant and recorded on August 20, 1924. It is provided in the mortgage that it shall be lawful for the mortgager (defendant) to retain possession of the registers until default in the payment of any part of said sum, and that, if any default be made, or if the mortgagee (plaintiff) shall feel insecure or

unsafe, all payments shall at its option become immediately due and payable, and it "shall have the right to take immediate possession of the registers wherever found," etc. Defendant made payments from time to time on the note to plaintiff's agent. After a payment of $50 had been made on November 17, 1926, plaintiff, through its attorney, Victor B. Scott, commenced suit against defendant in the Municipal court to recover all installments then due and unpaid. On January 11, 1927, while Scott was away from Chicago, defendant's attorney, Harry Weiner, called at Scott's office and gave to his assistant, John H. Clark, a check for $50 to apply on the note. Weiner stated to Clark that he and Scott had verbally agreed that, if defendant paid $50 and would agree thereafter to make payments of $50 each month on the note until fully paid, Scott would dismiss said pending suit. Weiner requested that the agreement be put in writing. Clark, having no knowledge of the case but believing Weiner's statement, drafted an agreement which he signed in plaintiff's name and which was also signed by defendant. It sets forth that defendant is indebted to plaintiff in a certain sum and that a suit is pending, etc. It then states that defendant agrees to pay to plaintiff $50, at Scott's office in Chicago, on or before the 11th day of each month thereafter, on account of said balance, and that plaintiff agrees to dismiss said pending suit and to "abstain from bringing further suits for said amount or amounts remaining unpaid from time to time until default is made in some payment as aforesaid." Nothing is said in the agreement relative to the existing chattel mortgage. When Scott returned to his office a day or two later, Clark handed him the $50 check, and a copy of the agreement, and told him what had happened. Scott immediately telephoned Weiner, telling him that he had made misrepresentations

to Clark, that he (Scott) had never agreed with Weiner or defendant to make on plaintiff's behalf any extension of the time of payment of the amount due, that he and plaintiff repudiated the agreement which Clark had signed without authority, that he (Scott) wanted further payments soon, and that he would cash said $50 check, given on January 11th, and credit defendant therefor on the note. This credit of $50 was endorsed thereon. Thereafter Scott continued to press defendant through Weiner for further payments. On February 23rd and March 17th, defendant made, through Weiner, two additional payments to Scott, aggregating $125, and the same were credited upon the note. Nothing was said at the time about the payments being made under said claimed extension agreement. When the March 17th payment was made, the note had matured and $474.75 remained due and unpaid thereon. Although Scott made further demands defendant did not make any other payments. In April, 1927, Scott discovered that defendant had disposed of some of the seven registers and two of them, taken under the writ, were found on premises other than defendant's premises.

We think that the evidence clearly shows that, by virtue of the chattel mortgage, plaintiff was entitled to the possession of the four registers taken under the writ on May 12, 1927, and that the court erred in entering the contrary judgment appealed from. On the trial defendant's attorney took the position that the payments of February 23rd and March 17th were made under the claimed extension agreement and that plaintiff could not repudiate that agreement without returning the $125. But the evidence disclosed that these payments were made by defendant by virtue of the original note, with full knowledge of plaintiff's repudiation of the claimed extension agreement. Furthermore, even if said agreement be considered as having been made, it did not affect the

terms of the chattel mortgage, and plaintiff, by virtue of the terms of that mortgage, was entitled to the possession of the registers.

Accordingly, the judgment of the municipal court is reversed and judgment is entered here that the right to the possession of the four cash registers, taken under the replevin writ and delivered by the bailiff to the plaintiff on May 12, 1927, is in the plaintiff, the National Cash Register Company.

REVERSED AND JUDGMENT HERE.

Barnes, P. J., and Scanlan, J., concur.

88 - 32088

FINDING OF FACTS.

We find as facts in this case that, on May 12, 1927, when the four cash registers in question were replevied, there was due and owing to plaintiff from defendant a balance of $474.75, on defendant's note, secured by a chattel mortgage on said registers and three others; that the claimed extension agreement of January 11, 1927, was signed by Clark without plaintiff's authority and was repudiated by plaintiff, of which repudiation defendant had due notice; that defendant's payments in February and March, 1927, aggregating $135, were made with the intention that they be applied on the indebtedness due on said note and were so applied by plaintiff; and that, on May 12, 1927, plaintiff, the National Cash Register Company, was entitled to the possession of said four registers, by virtue of the terms of said chattel mortgage.

88 - 20008

FILING OF 5-17.

To file as Parts in this case (Item, on Jan. 1, 1977, when the first such regulations in question was promulgated, there was one not using to plaintiff from a [illegible] of 1974-75, an [illegible]'s note, account by a [illegible] mortgage on such vehicles and there after [illegible] the [illegible] agreement of January 11, 1977, was signed by [illegible] Plaintiff's [illegible] and the [illegible] regulations [illegible] the motion [illegible] as February and March, 1977, [illegible] FLAN, [illegible] the instructions that they be applied on [illegible] made note and note of [illegible] by plaintiff; and [illegible], on Jan 18, 1977, plaintiff, the National [illegible], [illegible] entitled to the possession of such [illegible], by virtue of the terms of such chattel mortgage.

106 - 32046

ARTHUR CORMAN, administrator of the estate of Ida Gintaler, deceased, Plaintiff in Error,	ERROR TO
v.	CIRCUIT COURT,
NATHAN SUCHERMAN, Defendant in Error.	COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action for negligently causing the death of plaintiff's intestate on September 29, 1924, there was a jury trial, resulting in a verdict finding defendant not guilty, and a judgment against plaintiff for costs.

Plaintiff's declaration consisted of five counts. Two charged defendant with general negligence in so driving his automobile along the west driveway in Douglas Park, at or near 15th street, Chicago, that, while plaintiff's intestate was walking across the driveway and exercising due care, she was struck and run down by the automobile, etc. Two other counts charged negligence, respectively, in failing to give warning of the automobile's approach and in driving it at an unreasonable and excessive rate of speed. The remaining count charged defendant with willful and wanton negligence in the operation of the automobile. To all counts defendant filed a plea of the general issue.

Five witnesses to the accident, or to the happenings immediately before or after, testified on plaintiff's behalf. He also introduced a map of Douglas Park, showing on the west portion thereof a driveway which, at the place of the accident, is about 35 ft. wide and runs in a northerly and southerly

No. - 20066

ARTHUR GORMAN, nominal defendant of the estate of Jan Sinclair, deceased, Plaintiff in error, v. Sylvia [illegible], Defendant in error.	

Error to [illegible].

[illegible]

In an action for negligence against [illegible] of plaintiff's intestate on [illegible] [illegible] and a judgment against plaintiff for costs.

Plaintiff's decedent [illegible] two charged defendant with general negligence in [illegible] Ale Adamsville along the east [illegible] [illegible] was walking across the driveway and [illegible] was struck and run down by the automobile, and [illegible] charged negligence, respectively, in failing to give warning of the automobile's approach and in [illegible] and excessive rate of speed. The evidence [illegible] the automobile. In all counts defendants [illegible] general issue.

Five witnesses to the [illegible] immediately before or after, [illegible] he also introduced a map of [illegible] portion thereof a driveway which, at the place of the accident, is about 30 ft. wide and runs in a [illegible]

direction. The driveway is intersected at right angles by a crosswalk running from a lagoon in the park westerly, across the driveway and a portion of the park, to 18th street.

At the conclusion of plaintiff's evidence defendant moved for a directed verdict in his favor on all counts. The court, stating that "there is no willful and wanton negligence shown here," allowed the motion as to the count charging such negligence, but denied it as to all other counts. Plaintiff's attorney started to argue that plaintiff's evidence tended to show willful and wanton negligence on defendant's part, but the court said: "Let us not waste any time on that." No evidence was introduced by defendant except two photographs of the scene of the accident. Defendant was called as a witness in his own behalf, but, upon objection made as to his competency under the statute and his attorney admitting the incompetency, he did not testify. At the conclusion of all the evidence defendant renewed his motion for a directed verdict in his favor on all four counts charging negligence (the one charging willful and wanton negligence having been eliminated). His position was that, although he may have been guilty of some negligence, the contributory negligence of the deceased was the proximate cause of the accident and plaintiff could not recover. The court denied the motion, but the jury returned a verdict in defendant's favor.

The main contention of plaintiff's counsel is that the court committed reversible error in not allowing the issue as to whether defendant was guilty of willful and wanton negligence to be passed upon by the jury. After reviewing plaintiff's evidence we agree with the contention. The evidence disclosed in substance the following facts: About three o'clock on a bright, clear afternoon, Mrs. Gintzler was walking westerly

across the driveway on the crosswalk. Other pedestrians were crossing the driveway at the same time, some in front of her and some behind. The crosswalk was used frequently by pedestrians. Defendant was driving his automobile southerly at an excessive rate of speed on the west (right) side of the driveway approaching the crosswalk. For about 300 feet north of the crosswalk the driveway was practically a straight road and there was nothing to obstruct defendant's view of the pedestrians including Mrs. Gintzler. He did not check the speed of his automobile and did not sound his horn. Mrs. Gintzler had almost crossed over the driveway. She evidently was unaware of the rapid approach of the automobile, and did not quicken her pace. She was struck by a front portion of the car on its right side, caught up in some manner by it and dragged or carried 30 or 35 feet before it came to a stop. She received injuries which caused her death on the same day.

We think that this evidence tended to show such a gross want of care on defendant's part "as indicates a willful disregard of consequences or a willingness to inflict injury." (Bremer v. Lake Erie and Western Railroad Co., 316 Ill. 11, 20.) And where the evidence so tends, as said in the Bremer case, "it is a question to be determined by the jury whether the negligent conduct of the defendant amounted to wantonness or willfulness. (Children Express Co. v. Krug, 291 Ill. 472)." The facts in the present case are somewhat similar to those in Heidenreich v. Bremner, 280 Ill. 439, where a young girl, crossing Center avenue on the south crosswalk of 18th street, Chicago, was run down by a team and wagon and injured. She obtained a verdict and judgment in her favor. One of the counts of her declaration charged defendants with gross and wanton negligence in driving the team, by their servant, at a high and dangerous rate of speed towards and upon a public crossing.

The evidence tended to show that the horses and wagon were being driven north on Center avenue with the wheels of the wagon tracking in the east or northbound car tracks in that street; that the horses were going "at a pretty fast gait" or "were running fast"; that the east horse knocked plaintiff down and both of the east wheels of the wagon passed over her left leg; and that the horses did not stop until they had crossed to the north of 18th street. Defendants' attorney asked for an instruction that this evidence did not tend to show that plaintiff's injuries were received because of any gross or wanton negligence. The trial court refused to give the instruction and in the Supreme Court this ruling was assigned as error. The court, however, sustained the judgment, saying (p. 446):

> "Whether a personal injury has been inflicted by gross or wanton negligence is a question of fact to be determined by the jury. * * It is not always easy to state what degree of negligence the law considers equivalent to wanton or gross negligence. The character of an act as being wanton or gross is greatly dependent upon the circumstances of each case. To constitute willful and wanton negligence it is not always necessary to prove that the defendant was actuated by ill-will toward the plaintiff. An entire absence of care for the life, person or property of others, if such as exhibits indifference to consequences, makes a case of constructive or legal willfulness, such as charges a person whose duty it was to exercise care with the consequences of a legal injury."

Plaintiff's counsel further contend that other errors were committed by the court during the trial. If errors there were they are such as are not likely to occur upon a new trial, and discussion of them is unnecessary.

For the reason indicated the judgment of the circuit court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Barnes, P. J., and Scanlan, J., concur.

149 - 32090

J. P. WINNECOUR,
Appellee,

v.

HARRY GARVEY,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a 4th class action in contract, there was a trial without a jury in May, 1927, resulting in a finding and judgment against defendant for $179, and he appealed.

When the suit was commenced, March 10, 1927, plaintiff was, and had been since February 1, 1924, a tenant of an auto-tire shop (being a portion of the first floor of premises known as 3507 Michigan avenue, Chicago), under a written lease by one Alexander, as lessor. The lease expired on April 30, 1927. The rent for the last two years of the term was $75 per month. The shop was part of a three-story building, consisting of several stores with rooms above. During February, 1924, defendant became the lessee of the entire building, and Alexander, by endorsement as lessor on plaintiff's lease, assigned to defendant all interest in the lease and the rent secured thereby, and thereafter plaintiff became defendant's tenant and paid the rent up to and including April 30, 1927, when he moved out. During all of this time defendant occupied one of the stores of the building and conducted therein the business of druggist and pharmacist. There was a steam heating plant in the building which furnished steam heat to all the stores and rooms, including the shop. One of the provisions of the lease is that the "lessor agrees to * * supply hot and cold water for the use of

lessee (plaintiff) at all hot and cold water faucets, and steam for the steam heating apparatus in said premises; steam heat is to be furnished at all reasonable hours, when necessary, from October 1st until April 30th of the succeeding year, but * * said lessor shall not be liable in damages for unavoidable delay in furnishing hot or cold water, steam heat," etc.

Plaintiff alleged in his statement of claim that under the lease defendant was to furnish steam heat for the shop, but, failing to do so, instructed plaintiff to place therein a coal stove and gas heater, and agreed that he would reimburse plaintiff for the cost thereof; that relying upon these statements plaintiff purchased a coal stove and pipes, a gas heater, coal and gas, to the total cost of $179; but that defendant has refused to reimburse him, etc.

Plaintiff's uncorroborated testimony was in substance that in March, 1924, about a month after he moved into the shop, he did not receive sufficient heat and he complained to defendant; that defendant told him to get a gas heater and he (defendant) would pay for the cost of its installation as well as the cost of the gas used; that he installed the heater; that during the following winter he again complained of insufficient heat, and defendant told him to get a coal stove and coal, and that he (defendant) "at the expiration of the lease" (more than two years hence) would reimburse him therefor; that he installed the stove and purchased coal; and that the total cost to him of the different items was $179, as itemized in his statement of claim, viz: coal stove and pipes, $40, nine tons of coal, $72; cost of gas used $50, and gas heater $17. He did not produce at the trial any bills or receipts for the claimed disbursements. He further testified that in December, 1926, he showed defendant "some bills" and demanded re-

Jacoes (plaintiff) as all her and said other towards, or where for the steam heating apparatus in said premises which is to be furnished at all reasonable hours, when necessary. From October 1st until April 30th of the succeeding year, and a said lessor shall not be liable in damages for unavoidable delay in furnishing heat or hot water, steam heat," etc.

PLAINTIFF alleged in its statement of claim that upon the lease contract was to Yankah return back for the city, but, failing to do so, instructed plaintiff to place therein a gas stove and gas heater, and agreed that he would reimburse plaintiff for the cost thereof; that relying upon these representations plaintiff purchased a coal stove and pipes, a gas heater, coal and gas, to the total cost of $279; but that defendant has refused to reimburse him, etc.

PLAINTIFF's testimony in chief, and is substantially that in March, 1921, about a month after he moved into the house, he did not receive sufficient heat and he complained to defendant; that defendant told him to get a gas heater and he (defendant) would pay for the cost of its installation as well as the cost of the gas used; that he installed the heater; that during the winter he again complained of insufficient heat, that defendant told him to get a coal stove and coal, and that he (defendant) "at the expiration of the lease" would reimburse him therefor; that he installed the stove and purchased coal; that the total cost to him of the different items was $279, as itemized in his statement of claim, viz: coal $177, and pipes, $40, stove cost of coal, $72; cost of gas heater $10, and gas heater $17. He did not produce at the trial any bills or receipts for the claimed disbursements. He further testified that in December, 1921, he asked defendant "who pays" and defendant re-

imbursement and defendant promised to give him a check therefor but did not do so; that early in March, 1927, he again demanded payment, which defendant refused, saying: "You don't think I am going to pay you for these;" that shortly thereafter he commenced the present suit; and that he paid to defendant the last month's rent, due April 1, 1927, and did not hold back the payment of any rent because of his claim.

Defendant testified in substance that he never made any of the promises as testified by plaintiff; that he never promised plaintiff to reimburse him for any expenditures in obtaining additional heat in the shop; and that plaintiff never complained to him about not receiving sufficient heat. William Stewart, janitor of the building and in charge of the steam heating plant, testified that plaintiff at no time during the term of the lease made any complaints to him as to not receiving sufficient heat.

We are of the opinion that the court's finding and judgment are against the manifest weight of the evidence. Plaintiff's testimony as to defendant's claimed verbal promises is unreasonable and unsatisfactory. He says that the agreement was that he was to be reimbursed for the claimed expenditures at the expiration of the lease, yet before its termination he brought the present suit to recover for them, and after defendant had refused to reimburse him, as he says, he did not attempt to hold back any payment of rent. Defendant denied making any of the promises or agreements as claimed, and, in view of the terms of the lease and the character of plaintiff's business carried on in the shop, it is improbable that he should have done so. And both defendant and his janitor testified that plaintiff never complained to them that he was not receiving sufficient heat. Furthermore, in view of plaintiff's claims, it is

[illegible] and [illegible] premises to give rise to a [illegible] but did not do so only insofar in [illegible], [illegible] [illegible] payment, which defendant refused, saying: "[illegible] going to pay you for [illegible]" that thereby [illegible] the [illegible] the present suit; and that he paid to [illegible] the [illegible] year, due April 1, 1897, and did not [illegible] the [illegible] of [illegible] from because of his sickness.

Defendant testified in substance that he [illegible] of the premises on testified by plaintiff; that he [illegible] plaintiff to [illegible] him for any expenditures in [illegible] [illegible] tional work in the shop; and that plaintiff [illegible] [illegible] about not [illegible] anything [illegible]. [illegible] the building and in charge of the [illegible] plant, testified that plaintiff at no time during his [illegible] of [illegible] complaints to him as to not receiving [illegible] [illegible].

We are of the opinion that the court's finding and judgment are against the manifest weight of the evidence. Plaintiff's testimony as to defendant's claims [illegible] is [illegible] and unsatisfactory. He says that the [illegible] [illegible] be reimbursed for the claims [illegible] [illegible] [illegible]. Yet before his termination he brought the premises well to recover for them, and after defendant had retaken [illegible] [illegible] as he says, he did not attempt to make such [illegible] [illegible] defendant during any of the premises or [illegible] [illegible] and, in view of the terms of the lease and the [illegible] [illegible] plaintiff's business carried on in the shop, it is improbable [illegible] should have done so, and such [illegible] and his [illegible] that plaintiff never complained to him [illegible] [illegible] conflicted [illegible]. Furthermore, in view of [illegible], it is

somewhat singular that he did not have in court, at the time of the trial, the bills or receipts for the expenditures which he claimed he had made.

Accordingly, the judgment of the Municipal court is reversed, without remandment of the cause.

REVERSED FOR FINDING OF FACT.

Barnes, P. J., and Scanlan, J., concur.

149 - 32090

FINDING OF FACT.

We find as an ultimate fact in this case that defendant did not ever promise plaintiff that he would reimburse plaintiff for any expenditures for heating the premises.

247 I.A. 635

15 - 31672

KELSO & CO., INCORPORATED, Plaintiff in Error,	ERROR TO MUNICIPAL COURT
v.	OF CHICAGO.
FRANK MAIALE and ALEX ALIOTTA, Defendants in Error.	

MR. JUSTICE DUNLAN DELIVERED THE OPINION OF THE COURT.

The plaintiff, Kelso & Company, Inc., sued the defendants, Frank Maiale and Alex Aliotta, in the Municipal Court of Chicago, in an action of the first class. Plaintiff's claim was for money alleged to be due upon five promissory notes, each in the sum of $500, executed by Lewis H. Brill and William H. Schumer, and the payment of which was guaranteed by Lewis H. Brill, William H. Schumer, Frank Maiale and Alexander F. Aliotta. Fraud and a total failure of consideration are the defenses set up in the affidavit of merits. The case was tried before the court with a jury and there was a verdict returned finding the issues against the plaintiff. Judgment was entered on the verdict and this writ of error followed.

The plaintiff contends that the court erred in the admission of certain evidence. It appears from the evidence that about five or six months after the time that the defendants guaranteed the notes in question complaint was made by the defendants, or one of them, to the state's attorney of Cook County that the guaranties of the defendants were induced by a conspiracy and confidence game practiced by certain agents of the plaintiff, and two employees of the plaintiff, Fellonneau and Greetham, were called to the state's attorney's office and there interrogated in reference

to the said charges. These two witnesses, at the request of an assistant state's attorney, signed transcripts of the statements made by them. These statements tended strongly to support the said complaint. At the trial of the case neither the plaintiff nor the defendants called Fellonneau or Greetham but the defendants offered in evidence the statements, and over the objection of the plaintiff the court admitted them. That they were exceedingly harmful to the plaintiff cannot be disputed. They were admitted apparently upon the theory that they were declarations by an officer or agent of the plaintiff. Declarations of agents are not admissible unless they constitute a part of the res gestae of the transaction in question and are made at the time the transaction is being conducted. (Lowden v. Wilson, 233 Ill. 340, 348; O'Neill v. Lindsay Light Co., 181 Ill. App. 700, 703; Lincoln Coal Mining Co. v. McNally et al., 18 Ill. App. 181, 184; Linblom v. Ramsey, 75 Ill. 246, 250.) Numerous cases to the same effect might be cited, but the principle is too well established to require any further references. The statements of Fellonneau and Greetham were made long after the note transaction and in the course of an investigation by the state's attorney in reference to an alleged criminal offense. Such statements are not binding on the plaintiff. The error in admitting them is of such a serious nature that it calls for a reversal of the present judgment.

The defendant contends that two of the guarantors, Lewis E. Brill and William H. Schuster, were not made parties to the suit; that under the law one of the guarantors might have been sued, or all of them, but not an intermediate number, and that this non-joinder constitutes an absolute bar to the plaintiff's action. In the trial court the defendant did not raise this question by plea, motion or instruction, and the sole defense there was that the guaranties of the defendants were obtained by fraud, but

to the said charges. These two witnesses, at the request of an assistant state's attorney, signed transcripts of the statements made by them. These statements tended strongly to support the said complaints. At the trial of the case neither the plaintiff nor the defendants called Fellenzer or Goodman but the defendants offered in evidence the statements, and over the objection of the plaintiff the court admitted them. That they were exceedingly harmful to the plaintiff cannot be disputed. They were admitted apparently upon the theory that they were declarations by an officer or agent of the plaintiff. Declarations of agents are not admissible unless they constitute a part of the res gestae of the transaction in question and are made at the time the transaction is being conducted. (Sanders v. Gilson, 255 Ill. 580, 584; Schmidt v. Illinois Life Ins. Co., 161 Ill. 430, 705, 708; Lincoln Coal Association v. McGill et al., 11 Ill. App. 101, 104; Atchison v. Kennedy, 75 Ill. App. 700.) Numerous cases to the same effect might be cited, but the principle is too well established to require any further references. The statements of Fellenzer and Goodman were made long after the said transaction and in the course of an investigation by the state's attorney in reference to an alleged criminal offense. Such statements are not binding on the plaintiff. The error in admitting them is of such a serious nature that it calls for a reversal of the present judgment.

The defendant contends that two of the guarantors, Louis E. Bell and William R. Johnson, were not proper parties to the suit; that under the law one of the guarantors might have been sued, or all of them, but not an intermediate number, and that this non-joinder constitutes an absolute bar to the plaintiff's action. In the trial court the defendants did not raise this question by plea, motion or instruction, and the only defense there was that the guaranties of the defendants were procured by fraud, but

assuming, with a judgment in their favor, that they can raise the question here, there is no merit in the contention. (Sage v. Mechanics' Nat. Bank of Chicago, 79 Ill. 62; Kaestner v. The First Nat. Bank, 170 Ill. 322, 326; Smith v. Grabbe, 196 Ill. App. 325. See also Sec. 3, Chap. 76, Vol. 5, Callaghan's Ill. Stat. Ann., 4458, and Sec. 6, Chap. 98, Vol. 6, Id. 5286.) It must be noted in connection with the present contention that the note sued on is a negotiable instrument.

The judgment of the Municipal Court of Chicago is reversed and the cause is remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

36 - 31957

JOSEPHINE MULLALEY, Plaintiff in Error,	ERROR TO SUPERIOR COURT,
v.	COOK COUNTY.
WILLIAM J. MULLALEY, Defendant in Error.	

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On April 17, 1925, Josephine Mullaley, complainant, filed in the Superior Court of Cook County a bill for divorce against the defendant, William J. Mullaley. A default was taken against him and after a hearing the chancellor granted the complainant a divorce, and in the decree found (inter alia) that the complainant was possessed of, in fee simple, certain described real estate that was purchased by the complainant out of her own earnings; "that the parties hereto have and by mutual agreement settled and adjusted between themselves their property rights in reference to all of the property, both real, personal and mixed, belonging to them or either of them;" that all right, title and interest of the defendant, including dower and homestead rights in and to any of the real and personal property now owned by the complainant, or heretofore owned by her, or which she may acquire in the future, be, and the same is hereby forever terminated, barred and foreclosed; that all property of the complainant, be it real, personal or mixed, is hereby decreed and declared to be held by her, her heirs or legal representatives, free and clear of any and all claims whatsoever on the part of the defendant; "it is further ordered, adjudged and decreed that all right, title and interest

of the said complainant in and to any and all property owned by the defendant, be it real, personal and mixed, be, and the same is hereby forever terminated and barred; it is further ordered, adjudged and decreed that all the household furniture, fixtures and utensils of every kind and character now located in the premises known as 710-712 Junior Terrace, Chicago, be and the same are hereby granted to the complainant."

No appeal was taken from the decree but on September 9, 1927, two years and four months after the entry of the decree, the complainant sued out this writ of error and now asks this court to reverse the decree in so far as it finds "that the parties had by mutual consent settled and adjudged their respective rights, and in so far as it adjudges that all right, title and interest of the complainant in and to any and all property owned by the defendant, real, personal and mixed, be forever terminated and barred; and that in all other respects the decree be affirmed." The defendant has entered his appearance in this court and is defending the record.

The complainant contends (1) that "there are no allegations in the bill of complaint with reference to defendant's property, or to complainant's interest therein. Therefore the court could not properly enter an order or decree with reference thereto, even if there were facts shown by the evidence which would warrant such order or decree;" and (2) "there is no evidence or testimony to sustain the order that all right, title and interest of the complainant in and to all property of the defendant, real, personal and mixed, should be terminated and barred."

In the hearing before the chancellor the following occurred during the examination of the complainant: "Q. (By the solicitor for the complainant) You are not asking for alimony? A. No, I am in business myself. Q. In reference to the property which is described in the bill; that was purchased out of

of the said complainant is and be our and all property owned by the defendant, be it real, personal or mixed, so, and the same is hereby forever forbidden and barred; it is further ordered, adjudged and decreed that all the necessary furniture, fixtures and utensils of every kind and description in the premises known as 720-722 Junior Terrace, Chicago, in the possession of the complainant.

No appeal was taken from the decree but on September 9, 1947, two years and four months after the entry of the decree, the complainant moved on this date of error and was asking that he restore the decree in so far as it finds "that the petition has a meritorious motive and adjudged that motion right, and in so far as it adjudges that all right, title and interest of the complainant in and to any and all property owned by the defendant, personal and mixed, be forever terminated and barred; and that in all other respects the decree be affirmed." The defendant has entered his appearance in this court and is defending the decree.

The complainant contends (1) that "there was no allegation in the bill of complaint of a reference to defendant's property, or to complainant's interest therein. Therefore the court could not properly enter an order or decree with reference thereto, even if there were some grounds in the pleadings which would warrant such order or decree", and (2) "there is no evidence to sustain the order that all right, title and interest of the complainant in and to all property of the defendant, real, personal and mixed, should be eliminated and barred."

In the Petition Before the Chancellor the Pleading concerned during the examination of the complainant: "Q. Did the solicitor for the complainant, Tom Sim and Walter Ter Minassian, Mr. Mo; I am in business myself. Q. In reference to the property which is described in the bill that was purchased out of

your own money? A. Yes. Q. He has no interest or money in that? A. Not a bit. Q. The adjustment between yourself as to the property rights - you are to have one building and he is to keep one? A. Yes, he is to keep his and I am to keep mine."

The court will take judicial notice of the fact that under the practice the decree in the present case was prepared and presented to the chancellor by the solicitor for the complainant.

Because there are no allegations in the bill of complaint in reference to the defendant's property, it is contended that the court did not acquire jurisdiction of the subject matter of the defendant's property and could not enter any order in reference to it. There is no merit in this contention. The Superior Court of Cook County has jurisdiction of divorce cases and under the statute it has the power to adjudicate property rights as between the parties. As is said in O'Brien v. The People, 216 Ill. 354, and in other cases that might be cited, jurisdiction of the subject matter does not mean jurisdiction of the particular case but of the class of cases to which the particular case belongs, and does not depend upon the sufficiency of the pleadings. Complainant cites numerous cases holding that the allegations of the bill, the proof and the decree must correspond, but this familiar rule of equity pleadings has no application to the present contention of the complainant.

The complainant contends that there is no evidence in the record to support the finding and decree in reference to the property of the defendant. While the evidence of the complainant on that subject is rather meager, nevertheless, we are satisfied that the complainant introduced the same for the purpose of proving an agreement between the parties to the suit, and the chancellor, especially in view of the decree tendered to him by the solicitor for the complainant, was warranted in finding that there was an

you merely? A. Yes. Q. Do you use the Internet or money in that? A. Not a lot. Q. The defendants brought contract or to the property rights - you are to have our relationship and is to be long and? A. Yes, he is to prep his and I am to help them.

The court will have judicial notice of the fact that minor the practice the author in the present case was practiced and pursuing to the observation by the solicitor for the complainant.

Because there are no allegations in the bill of complaint in relation to the defendant's property, it is reasonable that the court did not require justification of the proposed action of the defendant's property and could not order any action in reference to it. There is no merit in this contention. The superior court of this country has jurisdiction of trusts under and under the trusts it has the power to distribute property to the beneficiaries. As is said in Brown v. The People, 16 Ill. 396, and in other cases that might be cited, jurisdiction of the subject matter does not mean jurisdiction of the particular case but of the class of cases to which the proceeding now pending, and does not depend upon the sufficiency of the pleadings. Complainant cites numerous cases making that the rulings of the bill, the proof and the decree must correspond, but this familiar rule of equity jurisdiction has no application to the present consideration of the complaint.

The complainant contends that there is no evidence in the record to support the finding and decree in relation to the property of the defendant. Only the relevance of the complained on that subject is taking account, [illegible] indicated that the complainant instructed the case for the purpose of proving an agreement between the parties to the suit, and the complainant, especially in view of the decree between [illegible] by the solicitor for the complainant, was interested in showing that there was

agreement between the parties as to their respective properties. The certificate of evidence shows that the complainant made no objection to the finding nor to that part of the decree that she now wishes modified. In view of her attitude before the chancellor she is in no position to urge her present contention.

There is a fundamental reason why the complainant cannot be given the relief she now seeks. A party cannot complain of an error which he has himself induced or procured the court to make. (Oliver v. Oliver, 179 Ill. 9, 14; Adams v. Crown Coal & Tow Co., 193 Ill. 445, 452; Paine v. Laughlin, 251 Ill. 396, 400; Gaunce v. I. I. & I. R. R. Co., 193 Ill. 464, 473; Olen v. Murphy, 325 Ill. 58, 60; Bernstein v. C. I. & I. Ry. Co., 147 Ill. App. 443, 446; Sukma v. Appleton Mfg. Co., 200 Ill. App. 403, 405-8.) Many other cases to the same effect might be cited. The complainant admits the principle laid down in the foregoing cases but argues that the present decree is neither a contested nor a consent decree, and that therefore it must be held to be the decree of the chancellor, and consequently the complainant has the right to ask that the decree be modified. Aside from the fact that the decree was presented to the chancellor by the solicitor for the complainant, if the principle stated can be applied to consent and contested decrees, in our judgment it can be applied with even greater force to a case like the present.

The decree of the Superior Court of Cook County is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

247 I.A. 635

67 - 38004

JAY STOUGH and GEORGE F. CAROLAN, copartners doing business under the firm name of STOUGH and CAROLAN, Plaintiffs in Error,	ERROR TO SUPERIOR COURT, COOK COUNTY.
v.	
JOHN W. REED, Defendant in Error.	

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The plaintiffs, Jay Stough and George F. Carolan, copartners doing business under the firm name of Stough and Carolan, sued the defendant, John W. Reed, in the Superior Court of Cook County in assumpsit. The declaration consisted of the common counts and the claim was for attorneys' fees and moneys expended by the plaintiffs as attorneys on behalf of the defendant. The affidavit of merits stated the amount due as $1690.20 - $1585 for attorneys' fees and $105.20 for expenditures. The defendant at first filed only a plea in abatement alleging "that the several supposed promises in the said declaration mentioned, if any such were made, were, and each of them was made jointly with John W. Perkins, who is still living, and with Howard Start, who is still living, and with James T. Sweeney, who is still living, and not by the said John W. Reed alone, and this he, the said John W. Reed, is ready to verify." When the case was called for trial the court, on defendant's motion, gave leave to the defendant to withdraw his plea in abatement and to file a plea of the general issue.

The evidence of the plaintiffs tends to show that the defendant was jointly interested with Floyd W. Perkins, and

perhaps with J. Howard Start and James T. Sweeney, in the reorganization of the Charles H. Fuller Company, and that Jay Stough, one of the copartners was employed as an attorney in connection with the said reorganization. We are satisfied from the record that the plaintiffs made out a prima facie case of liability against the defendant and that the proof tended to show that the services performed were worth $3000. It further appeared that the plaintiffs had incurred necessary liabilities in connection with the services performed of $101.20, and that the sum of $1500 had been paid by Perkins on account of the services rendered. The evidence also shows that John W. Reed, Floyd S. Perkins, J. Howard Start and James T. Sweeney were billed for the amount claimed to be due. The defendant admitted in open court that there was due and owing to the plaintiffs $89. The jury returned a verdict finding the issues for the plaintiffs and assessing the damages at the sum of $89. Judgment was entered on the verdict and this writ of error followed.

The plaintiffs assign a number of reasons why the judgment should be reversed, but in our judgment it is only necessary to consider one of them.

It will be noted that the declaration consisted of the common counts and that the plea in abatement first filed by the defendant was afterwards withdrawn on his motion. The court, at the request of the defendant, gave to the jury the following instructions:

> (1) "The court instructs the jury if you find from the evidence under the instructions of the court that the plaintiff was employed by Mr. Perkins and the defendant or by the defendant and others jointly to render services on their behalf and that said services were rendered on behalf of others as well as said defendant, then the plaintiff can not recover except for the sum of eighty-nine ($89) dollars, which is admitted to be due."

[illegible] with J. Morand Hart and James F. Mooney, in the co-
[illegible] of the Charles H. Tuttle Company, one [illegible]
one of the copartners was employed as an attorney in connection
with the [illegible] reorganization. He was entitled from the [illegible]
that the plaintiffs have an a [illegible] case of liability
against the defendants and that the trial tended to show that the
services performed were worth [illegible]. It further appeared that the
plaintiffs had incurred necessary liability in connection with
the services performed of $[illegible], and that the [illegible]
been paid by taking the account of the [illegible]. The [illegible]
[illegible] also shows that John W. Hunn, Lloyd H. [illegible], J. Morand
Hart and James F. Mooney were liable for the amount claimed to be
due. The defendant admitted in open court that there was due and
owing to the plaintiffs $[illegible]. The jury returned a verdict [illegible]
the issues for the plaintiffs and assessed the damages at the sum
of $[illegible]. Judgment was entered on the verdict, and [illegible] of error
followed.

The plaintiffs contend a number of reasons why the judgment
should be reversed, but as our judgment is only concerned with
[illegible] one of them.

It will be noted that the [illegible] of the
[illegible] counts and that the jury in [illegible] in the
defendant was afforded [illegible] on his behalf. The court, at
the request of the defendant, gave to the jury the following
instructions:

> (1) "The court instructs the jury if, on the [illegible]
> from the evidence [illegible] the instructions of the court
> [illegible] the plaintiff was employed [illegible] the
> [illegible] defendant or by the [illegible] and [illegible] jointly
> to render services on their behalf [illegible] and
> services were rendered on behalf of either or both of
> said defendant, then the plaintiff can not recover
> [illegible] for the sum of [illegible] ($[illegible]) [illegible], which
> is claimed to be due."

> (2) "The court instructs the jury that in order for the plaintiff to recover anything more than the eighty-nine ($89) dollars admitted to be due he must prove by a preponderance of the evidence that he was employed by the defendant alone to render the services mentioned in his declaration and that the defendant alone promised to pay therefor. It is not sufficient for the plaintiff to prove that he was employed by defendant and others jointly and that the defendant and others promised to pay therefor."

"The rule is, that if a person be omitted as a defendant who ought to have been joined in an action on a contract, advantage of the omission can only be taken by a plea in abatement unless the joint liability appears from the plaintiff's own pleading. (1 Chitty's Pl. 46; Lucey on Parties to Action, 247, 328; 1 Saunders' Pl. & Ev. 10; Hurd's Stat. 1911, chap. 1, sec. 4; Conley v. Good, Breese, 135; Lurton v. Silliam, 1 Scam. 577; Puschel v. Hoover, 16 Ill. 340; Pearce v. Pearce, 67 id. 207; Ross v. Allen, 67 id. 317; Lauhheimer v. Skinner Manf. Co., 165 id. 116.)" (Butter & Co. v. McLaughlin, 257 Ill. 109.) On the same subject matter the plaintiffs tendered five instructions, all of which the court refused to give. We will cite one of these:

> "The court instructs the jury, that, under the pleadings, the fact that Floyd R. Perkins, J. Howard Start and James T. Sweeney, or any of them, are not joined as co-defendants, can not be taken advantage of. It makes no difference whether they are joined or not."

In Pearce v. Pearce, 67 Ill. 207, - a case similar in facts and pleadings to the instant one - it was held that the trial court committed reversible error in refusing to give a like instruction.

For the error of the court in giving the two instructions, above referred to, at the instance of the defendant, and for the refusal of the court to give the instruction, above referred to, offered by the plaintiffs, the judgment in this case must be reversed. The defendant has argued at some length that no other verdict would have been just or fair and therefore the judgment in the present case should

> (3) "The court instructs the jury that in order for the plaintiff to recover exemplary damages from the eighty-nine (89) dollars received on the day in question by a preponderance of the evidence that he was employed by the defendant alone to receive the money mentioned in his evidence and that the defendant alone received so pay therefor. It is not sufficient for the plaintiff to prove that he was employed by defendant and others jointly and that the defendant was acting in pay therefor."

"The rule is, that if a person be induced to a contract, or might be have been induced in the action on a contract, ignorance of the omission can only be taken by a plea in abatement unless the joint liability appears from the plaintiff's pleading. (1 Chitty's Pl. 62; Story on Parties to Actions, 271, 300; 1 Saunders' Pl. & Ev. 191; Scott's Pract. Dict. Comp. L. 201. 2; Cooper v. Shaw, 1819; Jackson v. Tillinghast, 1 Conn. 277; Dunbar v. Dunton, 16 Ill. 626; Jones v. Jones, 27 Ill. 271; Lyon v. Lane, 27 Ill. 182; Lawrence v. Skinner and Ry., 141 Ill. 1.; Chapin v. Bloomington, 207 Ill. 109.) In the same subject matter the plaintiff's between five instructions, all of which the court refused to give. We will cite one of them:

> "The court instructs the jury, 1st, unless the plaintiff, the fact that Tilman, 2. Jackson, 3. Howard Cook and Jason T. Wesoney, or any of them, are not joined as co-defendants, can not be taken advantage of. It makes no difference whether they are joined or not."

In Jackson v. Jackson, 27 Ill. 277, - a case similar in fact and pleadings to the instant one - it was held that the trial court committed reversible error in refusing to give a like instruction.

For the error of the court in giving the two instructions, above referred to, at the instance of the defendant, and for the refusal of the court to give the instruction, above referred to, offered by the plaintiff, the judgment in this case must be reversed. The referee has argued at some length that as this action could have been tort and therefore the judgment in the present case should just or

be sustained. The record does not warrant any such contention. The judgment of the Superior Court of Cook County is reversed and the cause is remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

73 - 32011

BENJAMIN BLUMENTHAL, Plaintiff in Error,	ERROR TO SUPERIOR COURT,
v.	COOK COUNTY.
BARNEY BRAVERMAN, Defendant in Error.	

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The plaintiff, Benjamin Blumenthal, sued the defendant, Barney Braverman, in the Superior Court of Cook County in a suit in assumpsit. There was a trial before the court with a jury and at the conclusion of the plaintiff's case, on motion of the defendant, the trial judge instructed the jury to find the issues for the defendant. Judgment was entered on the verdict and this writ of error followed.

The declaration of the plaintiff consisted of the common counts. A bill of particulars was filed which stated "that the suit is for money due the plaintiff, Benjamin Blumenthal, for work done by the Mutual Construction Company on the building owned by the defendant and plaintiff in tenancy in common and that the plaintiff paid to the Mutual Construction Company on February 18, 1921, the sum of Seven Hundred and Eleven Dollars and Twenty Cents ($711.20); that there is due from the defendant to the plaintiff one-half of Seven Hundred and Eleven Dollars and Twenty Cents ($711.20) and interest since February 18, 1921, at six per cent per annum, making a total due of Four Hundred and Fifty-one ($451.00) Dollars." The defendant filed a plea of non-assumpsit and in his affidavit of merits denied that he was indebted to the plaintiff in any sum as charged in the common counts, and alleged

"that the work was done by the Mutual Construction Company, a corporation, upon a building owned by the plaintiff and the defendant, at the request of the Erie Furniture Co., a corporation, who was liable for said work; that the Mutual Construction Co., a corporation, obtained a judgment against the Erie Furniture Co., a corporation, for the amount due it for doing said work; that Erie Furniture Co., a corporation, paid said judgment, and that the plaintiff did not pay said judgment." (Italics ours.) The defendant also alleged in the affidavit "that there was a complete settlement and discharge of each of the parties' respective liabilities regarding all and any business transactions had between said parties prior to said time," but as this alleged settlement is not shown in the evidence it plays no part in the determination of the present appeal.

The plaintiff and the defendant were brothers-in-law and each owned one-half of the stock in the Erie Furniture Company, a corporation conducting a general furniture business. The defendant was the president and the plaintiff the treasurer of the corporation. The plaintiff and the defendant owned the premises at 1135 North LaSalle street, Chicago, as tenants in common. There was a building upon the premises and a barn or garage in the rear of the same, and it became necessary to have certain repair work done on the garage or barn. The plaintiff and the defendant discussed the matter of the repairs and the costs of the same and who should do the work, and they agreed that they would pay for the same "on a fifty-fifty basis." The Mutual Construction Company, a contracting firm, was hired to do the work. A written agreement, dated June 5, 1917, was executed between this company and the Erie Furniture Company. The agreement is signed by the Mutual Construction Company and by the Erie Furniture Company, by Barney Braverman, president, and the Furniture Company is therein

"that the work was done by the Natural Construction Company, a corporation, upon a building erected on the plaintiff's lot in defendant, at the request of the Erie Furniture Co., a corporation, who was liable for said work; that the Natural Construction Co., a corporation, entered a judgment against the Erie Furniture Co., a corporation, for the amount due it for said work; that Erie Furniture Co., a corporation, paid said judgment, and that the plaintiff did not pay said judgment." (Italics ours.) The defendant also alleged in the affirmative "that there was a complete settlement and discharge of such of the petition' respective liabilities regarding all and any business transactions had between said parties prior to said time;" but no this alleged affirmative defense is not shown in the evidence it plays no part in the determination of the present appeal.

The plaintiff and the defendant were partners-in-fact and each owned one-half of the stock in the Erie Furniture Company, a corporation conducting a general furniture business. The business was the property and the plaintiff was treasurer of the corporation. The plaintiff and the defendant owned the property on Erie Street (Italics ours.), Kansas, in question in issue. There was a building upon the premises and, being at odds in the management of the house, and it became necessary to have certain repairs work done on the premises or house. The plaintiff and the defendant discussed the matter of the repairs and the merits of the house and who should do the work, and they agreed that they would pay for the same "on a fifty-fifty basis." The Natural Construction Company, a contracting firm, was hired to do the work. A written agreement, dated June 5, 1927, was executed between this company and the Erie Furniture Company. The agreement is signed by the Natural Construction Company and by the Erie Furniture Company, by Henry Bowman, president, and the Furniture Company is therein

referred to as the owner of the LaSalle street premises. The plaintiff testified that he did not know that this contract was executed in the name of the Erie Furniture Company. That the LaSalle street premises were owned solely by the plaintiff and the defendant is admitted in the defendant's affidavit of merits and is clearly proven from the evidence. The Mutual Construction Company did the work called for by the contract and the total amount of its bill was $1106.65. Five hundred and twenty-five dollars appears to have been paid on this bill, and in March, 1919, the Construction Company sued the Erie Furniture Company in the Municipal Court of Chicago for the balance, $581.65, together with interest from August 18, 1917, and in May, 1919, obtained a judgment against that company, and on an appeal to this court the judgment was affirmed December 24, 1920. It appears that the plaintiff and the defendant, for some reason not disclosed by the record, became very unfriendly, and in 1919 Braverman sold to the plaintiff his stock in the Erie Furniture Company, and in July, 1920, he sold his interest in the LaSalle street premises to William Fogel. In February, 1921, the judgment of the Mutual Construction Company was paid by the plaintiff, and with his individual funds. The latter testified that prior to the time of payment he spoke to the defendant about the matter of the judgment and asked him to pay one-half of the same, but the defendant refused to do so and has never paid anything on account of the judgment.

In instructing the jury to find the issues for the defendant, the court held that the proof showed that in paying the judgment the plaintiff was not paying in any way an obligation of the defendant but was paying the debt of a third party, and that as the plaintiff had nothing in writing from Braverman authorizing the payment the Statute of Frauds precluded a recovery in the present case.

referred to as the owner of the Imlalia owned premises. The plaintiff specified that he did not from some time assumed and assumed in the name of the Erie Insurance Company. That the Imlalia street premises were owned solely by the plaintiff and the defendant is admitted in the defendant's affidavit of merits and is clearly proven from the evidence. The Trial Commissioner thought did the work solely for the owner as and the total amount of his bill was $1,500.00. Five hundred and ninety-five dollars appears to have been paid on this bill, and in March, 1919, the Construction Company sued the Erie Insurance Company in the Municipal Court of Chicago for the balance, $905.00, together with interest from August 15, 1917, and in May, 1919, obtained a judgment against this company, and on an appeal to this court the judgment was affirmed December 20, 1920. It appears that the plaintiff and the defendant, for some reason not disclosed by the record, became very estranged, and in 1921 differences arose in the plaintiff's office in the Erie Insurance Company, and in July, 1921, he made his interest in the Imlalia street premises to William Jones. In February, 1922, the judgment in the Municipal Court was satisfied by the plaintiff, and this suit followed. The Trial Court sustained the defendant's motion to dismiss the bill of complaint, and the plaintiff appealed from the decree of the Trial Court.

In determining the duty of the Court in this case for the defendant, the court held that the proof showed that in paying the judgment the plaintiff was not paying in any way on a liquidation of the indebtedness but was paying the debt of a third party, and that as the plaintiff had nothing to gain from discussing undertaking the payment the decree of Trial Court should be affirmed in the present case.

While it is true that the Erie Furniture Company was held to be legally liable to the Mutual Construction Company by reason of the contract in question, an entirely different situation is presented in the instant case. The plaintiff and the defendant were the sole owners of the premises in question. The repair work done by the Construction Company was with the knowledge, assent and direction of both of them and the property received the benefit of the work, and its value was increased, and the parties to this suit were the sole beneficiaries thereby. For some reason not disclosed by the record, the defendant used the Furniture Company as a "dummy" in the contract with the Construction Company. Had the Furniture Company paid the claim of the Construction Company or the judgment, under the facts of this case the plaintiff and the defendant would be legally bound to compensate it for the damages it thereby sustained. While the judgment was against the Furniture Company, in equity and good conscience, as between the parties to this suit, it represented an indebtedness of the plaintiff and the defendant, and the plaintiff in paying the judgment was not paying the debt of a third party. Moreover, the defendant having used the Furniture Company as a "dummy" in the said contract, he should not be heard to say in the present suit that the claim of the Construction Company was against a third party.

It is a familiar rule that where a tenant in common pays for necessary repairs on the property, or improves the property with the express or implied assent of his co-tenants, these all inure to the benefit of all of the co-tenants, and the law requires each to contribute to the expense, in proportion to their several interests. (Baird v. Jackson, 98 Ill. 70, 87.) Numerous cases to the same effect might be cited, but the

While it is true that the Erie Railroad Company was held to be legally liable to the Natural Conservation Company by reason of the contract in question, on entirely different grounds it presented in the instant case. The plaintiff was the defendant were the only owners of the premises in question. The rights were then by the Railroad Company, the plaintiff, owners and diversion of both of land was the property received the benefit of the work, and the value was increased, and the profits to this work was the sole consideration. For some reason not disclosed by the record, the defendant was the Northern Company as a "dummy" of the contract with the Conservation Company, and the plaintiff was the defendant, and the plaintiff in the same case the plaintiff was the defendant would be legally bound to compensate it for the damages it [illegible] complained. With the judgment was against the Northern Company, it might had gone [illegible], so between the parties in this case, it represented an indebtedness of the plaintiff and the defendant, and the plaintiff is paying the judgment, and paying the debt of a third party. Moreover, the corporation paying used the Northern Company as a "dummy" in the said contract, it would not be bound to pay in the manner said that the [illegible] Conservation Company was simply a third party.

It is a familiar rule that where a tenant in common pays for necessary repairs on the property, or improves the property with the consent or knowledge of his co-tenants, then all share in the benefit of all of the co-tenants, and the law requires each to contribute, in the proportion in that manner [illegible]. Bates v. [illegible], 88 Ill. 69; Hancock [illegible] in the same effect which is clear, but the

defendant concedes the rule and argues, apparently, that it applies only to cases in chancery. It is a sufficient answer to this contention to say that the plaintiff in the present action and under the common counts has the right to recover from the defendant. (Peterson v. Smith, 211 Ill. App. 431, 434-5; Highway Commissioners v. Bloomington, 163 Ill. 164, 172-6. See also Haven v. Mehlgarten, 16 Ill. 90, 95.) In this connection it is also well to remember that the plaintiff and the defendant had an understanding that each was to pay for one-half of the expense of the repairs.

In our opinion the trial court erred in instructing the jury to find the issues for the defendant, and the judgment of the Superior Court of Cook County is reversed and the cause is remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

82 - 32920

M. J. DWYER, Plaintiff in Error,	ERROR TO MUNICIPAL COURT
v.	OF CHICAGO.
A. CICCONE, Defendant in Error.	

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

M. J. Dwyer, plaintiff, sued A. Ciccone, defendant, in the Municipal Court of Chicago in an action on contract. Defendant filed an affidavit of merits , and, thereafter, on December 9, 1926, the cause was reached in the regular course for trial. Neither the defendant nor his counsel was present in court, and judgment was entered against him in the sum of $150. On January 20, 1927, the defendant moved the court to vacate the judgment order and in support of the motion filed an affidavit of the defendant's attorney which, stripped of its legal conclusions, frankly admits that the failure of the defendant and his attorney to appear in court at the time the case was called for trial was due to the negligence of an agent of defendant's attorney and that the failure to make a motion to vacate the judgment within thirty days after the entry of the same was due to the negligence of the said attorney. The trial court granted the motion of the defendant and on January 20, 1927, entered an order setting aside the judgment of December 9, 1926, and thereafter, on January 31, 1927, the case was called for trial and the plaintiff not appearing in court, on motion of the defendant, the suit was dismissed for want of prosecution and judgment for the defendant for costs was entered. Thereafter the plaintiff prosecuted this writ of error. The

defendant has not filed an appearance or a brief in this court.

The plaintiff contends that the affidavit in support of defendant's motion of January 20, 1927, did not disclose any facts or grounds that would warrant the trial court in reinstating the cause under section 21 of the Municipal Court Act and that therefore the court was without jurisdiction to vacate the judgment order of December 9, 1926, and that the court was also without jurisdiction to enter the order of January 31, 1927, dismissing the cause for want of prosecution and entering judgment for costs against the plaintiff. It is plain that the contention of the plaintiff is a meritorious one. (See Imbrie v. Berr, 230 Ill. App. 155; Reed v. Pennsylvania R. R. Co., Gen. No. 31781, Ill. App. Ct., opinion filed December 27, 1927.)

The judgment of the Municipal Court of January 20, 1927, vacating the judgment order of December 9, 1926, is reversed, and the judgment order of the Municipal Court of January 31, 1927, dismissing the suit of the plaintiff for want of prosecution and entering a judgment for costs in favor of the defendant is also reversed.

REVERSED.

Barnes, P. J., and Gridley, J., concur.

defendants has not filed an appearance or a brief in this court.

The plaintiff contends that the attempts to support of defendant's motion of January 20, 1967, did not evidence any fraud or grounds that would warrant the trial court in exercising the power under section 72 of the Civil Practice Act and that therefore the court was without jurisdiction to vacate the judgment order of December 2, 1966, and that the court was also without jurisdiction to enter the order of January 20, 1967, dismissing the cause for lack of prosecution and entering judgment for costs against the plaintiff. It is plain that the consideration of the plaintiff is a meritorious one. (See Jungle v. Sears, 300 Ill. App. 1947 case; Investment Co. v. [illegible], 111. App. 1963, quoting Ill. Jur. Number 27, 1957.)

The judgment of the Municipal Court of January 20, 1967, vacating the judgment order of December 2, 1966, is reversed, and the judgment order of the Municipal Court of January 20, 1967, dismissing the suit of the plaintiff for want of prosecution and entering a judgment for costs in favor of the defendant is also reversed.

Reversed.

Burke, P. J., and Kiley, J., concur.

91 - 33031

ROBERT L. LIGHTFOOT and ROSCOE C. CATER, doing business as Lightfoot & Cater, Appellants, v. JOHN SHERIDAN, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Robert L. Lightfoot and Roscoe C. Cater, doing business as Lightfoot & Cater, plaintiffs, sued John Sheridan, defendant, in the Municipal Court of Chicago, in an action of the first class. The plaintiffs were real estate brokers and they claimed that commissions were due them as the result of a transaction in which the defendant exchanged certain property belonging to him for other property belonging to one Shepard. The defendant in his affidavit of merits denied that he employed the plaintiffs in connection with the said transaction, and denied that the plaintiffs, or either of them, procured a purchaser for the property of the defendant or that they were instrumental in any way in securing a purchaser for the said property. The cause was submitted to the court for trial without a jury and the court, after hearing the evidence, found the issues against the plaintiffs and entered judgment on the finding. This appeal followed.

The defendant complains that the abstract filed in this court is very incomplete, and in our study of the evidence we have reached the conclusion that this complaint is justified. We find a number of instances where testimony that tends to rebut the theory of fact of the plaintiffs is omitted from the

abstract. We, therefore, have been compelled to resort to the record in our examination and study of the evidence. If the defendant instead of merely complaining that the abstract was "woefully incomplete," had filed an additional abstract it would have saved this court much time and trouble.

We have made a careful and exhaustive study of the evidence in this case and we have reached the conclusion that the finding of the trial court was the only one that could be justified under all the facts and circumstances in proof.

The trial court made certain findings of fact, and the plaintiffs contend that in view of these findings the trial court should have held that the plaintiffs were entitled to commission from the defendant. They further contend that the trial court erred in holding as a proposition of law that the plaintiffs were agents of Shepard and that one Washington was the agent of the defendant. In view of the conclusion we have reached in respect to the merits of the case, it is entirely unnecessary for us to consider these contentions of the plaintiffs.

The judgment of the Municipal Court should be and it is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

247 I.A. 636

109 - 32049

JACOB HANDELSMAN,
Defendant in Error,

v.

SUSAN E. CLARKE,
Plaintiff in Error.

ERROR TO CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Circuit Court of Cook County, Jacob Handelsman, plaintiff, sued Susan E. Clarke, defendant, in trescass on the case on promises. The claim of the plaintiff was for rents and attorneys' fees alleged to be due the plaintiff under the terms of a written lease dated July 26, 1923, in which the plaintiff was the lessor and Elmer S. Clarke, Lyman J. Clarke and Clifford M. Clarke were the lessees. The defendant was guarantor on the lease. The lease covered the store room on the second floor of the building known as 5213-14 West Chicago avenue, Chicago. The term was from October 1, 1923, to September 30, 1928, and the rental was $300 per month for the first thirty-six months of the period and $325 per month for the balance of the period. The declaration alleges that the lessees failed to pay the rent "for 13 months commencing June, 1925, until and including June, 1926." The lease contained (inter alia) the following provision: "In case said premises shall be rendered untenantable by fire or other casualty, the Lessor may at his option terminate this lease, or repair said premises within thirty days, and failing so to do, or upon the destruction of said premises by fire, the term hereby created shall cease and determine." The defendant filed a plea of the general issue and an affidavit of merits. Thereafter, on

Plaintiff,	
vs.	
Defendant in error.	

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT:

In the Circuit Court of Cook County, Jacob Lewistown, plaintiff, sued Simon S. Clarke, defendant, in trespass on the case on promises. The claim of the plaintiff was for rents and attorneys' fees alleged to be due the plaintiff under the terms of a written lease dated July 26, 1920, in which the plaintiff was the lessor and Clark S. Morris, James C. Clarke and Gilfred K. Clarke were the lessees. The defendants was guarantor on the lease. The lease covered the store room on the ground floor of the building known as 3024-26 West Chicago Avenue, Chicago. The term was from November 1, 1920, to September 30, 1924, and the rental was $100 per month for the first thirty-six months of the period and $125 per month for the balance of the term. The contention arises when the lessee Clark S. Morris in the fourth 18 months commencing June, 1923, small and [illegible] lease. The lease contained (inter alia) the following provision: "In case said premises shall be rendered untenable by fire or other casualty, the lessor may at his option terminate the lease, or repair said premises within thirty days, and failing so to do, at upon the 5 obligations of said parties by fire, the lessee hereby waives all claims and liabilities." The defendant filed a plea of the general issue and an affidavit of merits. Thereafter, on

December 21, 1926, on motion of the plaintiff, the defendant's plea and affidavit of merits were stricken from the files and the defendant was ordered to plead within twenty days from that date. On March 11, 1927, on motion of the plaintiff (notice of the motion having been served upon the attorney for the defendant), the court entered an order defaulting the defendant "for want of an amended affidavit of merits." Thereupon the court assessed the plaintiff's damages in the sum of $3472.98 and entered judgment upon the finding. On March 19, 1927, the defendant (represented by new counsel) moved the court to set aside the judgment and to permit the defendant to file a plea and an amended affidavit of merits and in support of the motion two affidavits were filed, one by the defendant and another by Lyman J. Clarke, one of the lessees under the lease. The affidavit of the defendant states that she is a housewife fifty-six years of age and has never before had any legal proceeding against her; that she is the mother of ten children ranging from nine years upward; that during her lifetime she has been engaged in looking after her home and the education of her children; that in June, 1926, she was served with summons and employed one C. J. Chambers, an attorney, to defend her; that she supposed that said attorney was looking after her interests and that on or about March 18, 1927, she was informed that a judgment for $3472.98 had been rendered against her for failure to file an amended plea and affidavit of merits and that upon investigation she found that said judgment had been rendered; that she took the matter up with her attorney and that he stated that he could do nothing for her; that she then consulted Adams and Adams, attorneys and asked them to make an investigation and look after her interests; that she exercised all diligence in hiring an attorney and

instructing him to look after her defense and that she has also exercised all diligence in making application to set aside and vacate the judgment and that this application is made at the earliest opportunity; that she has a good and meritorious defense to the whole of plaintiff's claim; that in July, 1923, the lessees, Elmer E., Lyman J. and Clifford M. Clarke (affiant's three sons), all being of legal age, wished to rent part of the premises at 5212-14 West Chicago avenue, in which to conduct a furniture store, and that on July 16, 1923, they entered into a lease with plaintiff for certain portions of the said building for a term from October 1, 1923, to September 30, 1928, and that at their request this affiant signed a guaranty for the payment of rent according to the terms of the lease; that on May 19, 1925, without fault of affiant or the lessees, but through the negligence of the plaintiff in this cause, there was a fire in the building that commenced in the portion occupied by the plaintiff and that the store fixtures and the property and merchandise belonging to lessees were greatly damaged; that the entrance and stairway leading to the premises occupied by the lessees were so badly damaged that no one could enter and the entire building was so damaged that the plaintiff and the lessees could do no business therein and that the premises were not in a condition so that merchandise could be sold or the public admitted; that the lease contains the following clause: "In case said premises shall be rendered untenantable by fire or other casualty, the Lessor may at his option terminate this lease, or repair said premises within thirty days, and failing so to do, or upon the destruction of said premises by fire, the term hereby created shall cease and determine;" that the premises were not repaired within thirty days and the plaintiff failed to repair said

insurance company to look after her affairs in this one and also exercised all diligence in making repairs to the house and vacate the premises and that this repairs in made at the earliest opportunity; that she has a good and meritorious defense to the claim of plaintiff's claim; that in fact, the tenants, Simon R., Irene T. and Gilbert H. Garrie (defendants herein named), all being of legal age, signed on that part of the premises as 2212-14 East Chicago avenue, as which is commonly known as Chicago, and that on July 14, 1945, they entered into a lease with Plaintiff for certain portions of the said building for a term from October 1, 1945, to September 30, 1946, and that at the time of signing said lease, defendants signed a guaranty for the payment of rent according to the terms of the lease; that on July 31, 1945, without fault of defendant or the lessees, but through the negligence of the plaintiff in this cause, there was a fire in the building that commenced in the portion occupied by the plaintiff and that the above Plaintiff and the property and merchandise belonging to Simon and Irene T. damaged; that the entrance and exit by means of the premises occupied by the lessees were in fact changed and so as to cause order and the entire building was so damaged that the plaintiff and the lessees could do no business therein and that the premises were not in a condition so that merchandise could be sold or the public admitted; that the lease provides as follows: "In case said premises shall be damaged or destroyed by fire or other casualty, the lessor may at his option terminate this lease, or repair said premises within thirty days. and failing to do so, at upon the determination of this phrase by fire, the lease terminated shall cease and determined." In the premises was not repaired within thirty days and the landlord failed to repair and

premises within thirty days after May 19, 1925; that on June 24, 1925, the premises had not been repaired or rendered tenantable and it was then mutually understood and agreed between the plaintiff and the lessees in said lease that for a consideration of $472 plaintiff would release and cancel said lease and also that the lessees were to move out and that the plaintiff would release and discharge lessees from further liability on said lease; that the sum of $472 was paid to the plaintiff and the lessees immediately moved out of said building, and the premises in question were turned over to the plaintiff and accepted by him; that the building was not repaired until about the middle of August or the first of September, at which time plaintiff took possession and has occupied the same ever since. "Affiant further states she is not liable for any rent on account of signing the guaranty because there was no default in the covenants by the lessees, but on the contrary defendant says that plaintiff, Jacob Mandelaman, failed and refused to repair premises within thirty days after May 19, 1925, and that the lease therefore ceased and determined and that plaintiff released the lessees for the consideration of four hundred seventy-two dollars ($472) from further liability on account of the lease." The affidavit of Lyman J. Clarke states that he is one of the lessees in the lease; that on or about May 19, 1925, the premises described in the lease were damaged by fire and rendered untenantable and that the plaintiff did not thereafter repair the premises within thirty days; that since the fire none of the lessees have at any time had the use of the premises described in the lease; that the lessees were in partnership, and that on or about June 24, 1925, he, acting for the partnership, entered into an agreement with the plaintiff "that on account of the fire damaging the said premises and rendering them untenantable that for and in consideration of the

sum of $472.00 the Plaintiff Jacob Mandelsman would cancel the aforementioned lease and would forever release the Lessees * * from any further liability on said lease; * * that in pursuance of said agreement the sum of $472.00 was paid to the said Plaintiff and also that the said Lessees moved out and turned over to the Plaintiff immediately the premises; * * that the said premises * * were not repaired or rendered tenantable until about the middle of August or the first of September and that the Plaintiff moved into same after they were repaired and has occupied them ever since." The plaintiff filed an affidavit of his attorney to the effect that he had telephoned to the office of the former attorney of the defendant four times, urging him to file an amended affidavit of merits, and that the said attorney stated that he had made efforts to communicate with his client and that the defendant paid no attention to the communications; that on March 11, 1927, when the default and judgment were taken, an associate of the counsel for the defendant appeared in court "and informed the court as to why they did not file an amended affidavit of merits." The court denied the motion to vacate the judgment and the order of default, and thereafter the defendant prosecutes this writ of error.

That the defendant was guilty of some negligence must be conceded. That the affidavits filed by the defendant set up a meritorious defense cannot be disputed. If the facts stated in the affidavits are true - and upon the motion in question they must be presumed to be - the claim of the plaintiff is without the slightest merit, and it would be a reflection upon the courts to allow the instant judgment to stand unless the negligence of the defendant is of such a character that the courts cannot look to the nature of her defense. In Mason v. McNamara, 37 Ill. 274, 277, the court says: "As we understand the long and well settled practice in this State, it has always been liberal in setting

aside defaults at the term at which they were entered, where it appears that justice will be promoted thereby. Nor has the practice, so far as our knowledge extends, been so rigid as to require the party moving to set the default aside, to bring himself within the strict rules which govern applications in equity for new trials at law. But where it appears by affidavit, that the party has a defense to the merits, either to the whole or a material part of the cause of action, it has been usual to set aside the default, if a reasonable excuse is shown for not having made the defense. It has also been the practice to impose reasonable terms upon the defendant as a condition to allowing his motion, such as that he plead to the merits, that he pay the costs or that he comply with such other reasonable terms as may be imposed. In such cases the object is that justice be done between the parties, and not to permit one party to obtain and retain an unjust advantage." The Supreme Court has often cited with approval the above quotation. In Dunlap v. Gregory, 14 Ill. App. 601, 608, the court quotes with approval the following from Baugh v. Suter, 3 Bradwell, 274: "In applications to set aside default, we regard the point of a meritorious defense as altogether the more important of the two required, and where the judgment is evidently unjust, a certain degree of neglect may, especially as terms can be imposed, be held to be excusable." And the court, in referring to the meritorious defense set up in that case, uses the following language: "To permit such a judgment to stand would be a reproach to a court of justice, unless, indeed, the plaintiff in error is chargeable with such a degree of negligence as to leave him no standing in court," and the court held that while the defendant had not exercised the highest degree of diligence, still he had not shown such a lack of diligence as should debar him from an opportunity to present his

defense upon the merits. In City of Moline v. C. B. & Q. R. R. Co., 262 Ill. 52, it appears that the defendant failed to file objections to the assessment roll in apt time, and the roll was confirmed and judgment entered on July 5th. On July 8th the defendant made a motion that the judgment of July 5th, so far as it related to the property of the defendant, be set aside and that it be given an opportunity to file objections to the confirmation of the assessment roll. The court denied the motion and the defendant appealed. While it is evident that the defendant in that case was not free from negligence, nevertheless, the Supreme Court held that the defendant's affidavits set up a meritorious defense and that under the circumstances the defendant should have been allowed an opportunity to file objections, and the court again states the principle that "under the long and well settled practice in this State the courts have been liberal in setting aside defaults at the term at which they were entered when it appears that justice will be promoted thereby." (See also McMurray v. Peabody Coal Co., 281 Ill. 218, 226.)

After a study of many of the Illinois cases that bear upon the question presented by this writ of error, it may be stated that the courts are strongly inclined to vacate a default judgment where the motion to vacate is made in term time and where it clearly appears that the judgment, if it be permitted to stand, would work grave injustice and oppression, and where it further appears that the negligence of the defendant is not of such a character as "should debar him from an opportunity to present his defense on the merits." In many of the cases in which the appellate courts have refused to vacate judgments by default it will be found that the defenses interposed on the merits were not of a clear and satisfactory kind. Our courts are loath to deny a litigant his day in

Defense upon the merits. In Illinois v. [illegible], 1 Ill. App. 3d, 322 Ill. App. 3d, it appears that the defendant failed to file objections to the measurement until [illegible] days, and the trial was conducted and judgment entered on [illegible]. In fact the defendant made a motion that the judgment of [illegible] be set aside insofar as it related to the property of the [illegible], in order that he might be given an opportunity to file objections to the confirmation of the measurement roll. The court denied his motion and the defendant appealed. While it is true that the statutes in that case was not free from ambiguity, nevertheless, the Appellate Court held that the defendant's attorney had no a motion defense and that under the circumstances the defendant should have been allowed an opportunity to file objections, and the court again stated the principle that "where the long and well settled practice in this state the courts have been liberal in entering order confirming at the term at which they were entered when it appears that justice will be promoted thereby." (See also [illegible] v. [illegible] Coal Co., 322 Ill. 232, 236.)

After a study of many of the Illinois state court decisions on the question presented by this writ of error, it may be stated that the courts are strongly inclined to vacate a default judgment where the motion to vacate is made in term time and where it clearly appears that the judgment, if it be permitted to stand, would work grave injustice and oppression, and that if further appears that the negligence of the defendant is not so great as to warrant a conclusion that "should deny him from an opportunity to produce his defense on the merits." In many of the cases in which the Illinois courts have refused to vacate judgments by default, it will be found that the defense interposed on the merits was not of a clear and a conclusive factory kind. Our courts are loath to deny a litigant his day in

court, and the alleged negligence of a defendant, who has been defaulted, must be viewed, to some extent at least, in the light of the nature of the defense on the merits that he interposes.

After a careful consideration of the record in this case, we are of the opinion that the trial court erred in denying the motion of the defendant to vacate the judgment, and the judgment of the Circuit Court of Cook County is reversed and the cause is remanded with directions to the court to allow the defendant to file a plea and affidavit of merits.

REVERSED AND REMANDED WITH DIRECTIONS.

Barnes, P. J., and Gridley, J., concur.

119 - 32060

AUGUST LAUTERBACH et al., (complainants), Appellees,	
v.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
FOREMAN TRUST AND SAVINGS BANK et al., (Defendants),	
AARON BODENWEISER and BERTHA M. BODENWEISER, (Defendants), Appellants.	

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

August Lauterbach, Loreto Alonzi and Carlo Alonzi filed their bill of complaint in the Superior Court of Cook County against Foreman Trust and Savings Bank, a corporation, Aaron Bodenweiser and Bertha M. Bodenweiser. From a decree finding the equities with the complainants and granting the relief prayed for in the bill, the defendants Aaron Bodenweiser and Bertha M. Bodenweiser have prosecuted this appeal. The bill, filed September 10, 1926, alleges that in February, 1926, Loreto Alonzi and Carlo Alonzi entered into a verbal agreement to purchase certain real estate in Florida from Bertha M. Bodenweiser and Aaron Bodenweiser for $5400; that pursuant to this agreement August Lauterbach, acting in behalf of the complainants Loreto Alonzi and Carlo Alonzi, entered into a written escrow agreement with the defendant Aaron Bodenweiser, and deposited with the Foreman Trust and Savings Bank, as escrowee, the sum of $54[illegible]; that this sum belonged to Loreto Alonzi and Carlo Alonzi; that it was provided in the escrow agreement that Aaron Bodenweiser deposit a warranty deed from Bertha M. Bodenweiser and Aaron Bodenweiser, her husband, as grantors, to said Alonzis as grantees, conveying

certain lots in Crescent City, Putnam County, Florida, and that Aaron Bodenweiser should deposit with the escrowee a title guarantee policy covering the property, to be issued by the Palatka Abstract and Guarantee Company or New York Title and Mortgage Company, showing good title in Bertha W. Bodenweiser subject to certain rights and restrictions; that upon deposit of the policy the escrowee should deliver the warranty deed and guarantee policy to August Lauterbach, together with interest on the $5400 at the rate of three per cent per annum from date of said escrow agreement to date of distribution of the escrow, and to deliver the balance of the money to Aaron Bodenweiser; that Bodenweiser has not deposited with the escrowee the warranty deed and title guarantee policy; that complainant Lauterbach has repeatedly requested him to deposit the documents so as to complete the transaction, and that on May 17, 1926, Lauterbach, in writing, demanded that he furnish the necessary title papers within ten days from May 17, 1926; that complainants thereafter repeatedly demanded of Bodenweiser that the terms of the escrow be complied with but that he has failed to deposit the necessary title papers and deeds; that more than a reasonable time has elapsed since the making of the escrow agreement within which he should comply with the conditions on his part to be performed; that the complainants have been deprived of the use of their money and the use of the land; that the complainants have heretofore, and do hereby, declare the escrow agreement terminated and cancelled, and have heretofore, and do now hereby, demand the return of the $5400. The bill prays that Foreman Trust and Savings Bank may be ordered and directed to return and pay over to the complainants the $5400, together with interest thereon from February 25, 1926, at the rate of three per

cent per annum, and that the contract may be fully terminated and cancelled. The bank filed an answer admitting the escrow agreement and offering to deliver the deeds and money to the person or persons whom the court should determine to be entitled thereto. In the answer of the defendants Aaron Bodenweiser and Bertha M. Bodenweiser, they admit the execution of the escrow agreement and the depositing of the $5400 with the escrowee by Lauterbach and they state that in pursuance of the agreement the defendant Aaron Bodenweiser deposited with the escrowee a warranty deed from Bertha M. Bodenweiser and Aaron Bodenweiser, her husband, as grantors, to Loreto Alonzi and Carlo Alonzi as grantees, conveying the real estate in question and that they have also deposited a quit claim deed to the property from Harold V. Pearlman, a bachelor, as grantor, to Loreto Alonzi and Carlo Alonzi as grantees, in accordance with the terms of the agreement. Defendants further answer that the complainants knew that the only possibility of clearing the title to the real estate to the satisfaction of the complainants was by proceedings in the courts of Putnam County, Florida, and that such proceedings might be indefinitely prolonged; that soon after the execution of the escrow agreement the defendants caused legal proceedings to be instituted in the Circuit Court of Putnam County, Florida, to quiet title to the real estate and that they have expended a considerable sum of money towards that end; that the proceedings are still pending and undisposed of and the defendants deny that, under the circumstances, a reasonable time has elapsed since the making of the agreement within which Aaron Bodenweiser should comply with the conditions upon his part to be performed.

The cause was referred to a master, who heard evidence and filed a report finding the equities with the complainants and that they were entitled to the relief prayed for, and recommending that the contract and escrow agreement "be held by decree of this court to be terminated and canceled, and that the

defendant Foreman Trust and Savings Bank, a corporation, be ordered and directed by said decree to return and pay over to the complainants the aforesaid sum of Fifty-four hundred dollars ($5400.00) together with interest thereon from February 25th, A. D. 1926, at the rate of three per cent (3%) per annum, and that said contract may be fully terminated and canceled as prayed for in the bill of complaint." The chancellor entered a decree in accordance with the findings and recommendations of the master save that the court allowed the complainants interest on the $5400 at the rate of five per cent per annum from the date of the filing of the bill, instead of the interest recommended by the master.

The master, in his report, and the chancellor, in the decree, found that more than a reasonable length of time for performance by the defendant Aaron Rosenweiser elapsed between the making of the escrow agreement and the filing of the bill, and the finding in the decree that the complainants were entitled to a rescission of the contract and a return of the money deposited was based upon the fact that the defendant at the time of the filing of the bill had not filed with the escrowee the guarantee policy required by the escrow agreement. It is conceded by the defendants that the policy was not filed with the escrowee until April 6, 1927. The written escrow agreement is silent as to the time when it was to be delivered. It is agreed between counsel that as the time of performance is not specified, the policy, under the law, was to be delivered within a reasonable time; and it is further agreed that what constitutes a reasonable time, depends upon the facts and circumstances surrounding the particular case. The defendants concede that "the principal question for review by this court is whether under the circumstances in which the escrow agreement was entered into, a reasonable time had elapsed prior to the filing of the bill of complaint, for performance on the part of

defendant Farmers Trust and Savings Bank, a corporation, be ordered and directed by said decree to return the money paid by the complainants the aforesaid sum of fifty-five hundred dollars ($5500.00) together with interest thereon from February [illegible], 19[illegible], at the rate of three per cent (3%) per annum, and that said contract may be fully terminated and cancelled as prayed for in the bill of complaint." The chancellor entered a decree in accordance with the findings and recommendations of the master save that the court allowed the complainants interest on the $5500 at the rate of five per cent per annum from the date of the filing of the bill, instead of the interest recommended by the master.

The master, in his report, and the chancellor, in the decree, found that there was an unreasonable length of time for performance by the defendant since considerable time elapsed between the making of the escrow agreement and the filing of the bill, and the finding in the decree that the complainants were entitled to a rescission of the contract and a return of the money deposited was based upon the fact that the defendant at the time of the filing of the bill had not filed with the [illegible] the guarantee policy required by the escrow agreement. It is conceded by the defendants that the policy was not filed when the bill was filed ([illegible] 19[illegible]). The written escrow agreement is silent as to the time when it was to be delivered. It is agreed between counsel that, as the time of performance is not specified, the policy, under the law, was to be delivered within a reasonable time; and it is further agreed that what constitutes a reasonable time depends upon the facts and circumstances surrounding the particular case. The defendants contend that the principal question involved in this court is whether under the circumstances in which the escrow agreement was entered into, a reasonable time had elapsed prior to the filing of the bill of complaint, for performance on the part of

appellants," and they assert that under all the circumstances in the case the master and the chancellor should have found that a reasonable time had not elapsed. We have made a very careful examination of the evidence bearing upon this subject and we are satisfied that the findings of the master and the chancellor were clearly justified under the proof. Nor do we think that the evidence sustains the further contention of the defendants that the complainants waived prompt performance by the defendants.

On April 15, 1927, the defendants Aaron Bodenweiser and Bertha M. Bodenweiser petitioned the court for leave to file an amendment to their joint and several answers and for a further hearing upon the bill of complaint and their answers as amended. The proposed amendment recites that on January 26, 1927, a final decree was entered in the Circuit Court of Putnam County, Florida, in the bill to quiet title, and that by the decree the title of Bertha M. Bodenweiser to the property in question "was established as a good and indefeasible title in fee simple," and that thereafter a title guarantee policy was issued by the New York Title and Mortgage Company, showing good title to the property in Bertha M. Bodenweiser, subject only to taxes for the year 1926 and subsequent thereto, and that on April 3, 1927, the defendant Aaron Bodenweiser had deposited the policy with the escrowee. The chancellor denied leave to file the proposed amendment, and the defendants contend that the chancellor erred in so doing. We find no merit in this contention. At the time of the filing of the petition the testimony in the cause had been concluded and the master's report had been filed March 22, 1927, and the cause was before the chancellor, on a motion of the complainants, to overrule the exceptions to the master's report and to enter a decree. In our judgment the chancellor did not err in denying the defendants leave to amend their answer. (See Harding v. Olson, 177 Ill. 396, 403.) The defendants cite

in support of their contention Gibson v. Brown, 214 Ill. 330, and Heller v. McQuim, 261 Ill. 558. In each of these cases the complainant was seeking to enforce specific performance of a contract. In the instant case the bill of the complainants sought the cancellation of the contract and the return of the money deposited thereunder, and as the defendants filed no cross-bill, the sole question under the pleadings was as to whether or not, at the time of the filing of the bill on September 10, 1926, a reasonable time for performance by the defendants had elapsed. If the complainants were entitled to the relief prayed for, that right could not be affected by proof that the defendants had filed with the escrowee on April 5, 1927, the title guarantee policy. The contention of the defendants that by reason of the answer of the escrowee, "the issues are between appellants and appellees, appellants seeking to compel specific performance of the contract, and appellees seeking its cancellation," is, of course, without merit. Neither by the pleadings nor by the assignment of errors is the right of the defendants to specific performance in the present proceedings asserted. If the complainants were denied the relief they sought, the only order that could have been entered would be one dismissing the bill for want of equity.

The chancellor allowed the complainants five per cent interest from the date of the filing of the bill on the $5400 deposited in escrow and the defendants insist that the complainants were not entitled to the allowance of any interest. After a careful consideration of this contention, we have reached the conclusion that it is a meritorious one. By the decree the escrow agreement is cancelled and there is therefore no express provision for the payment of any interest, but the complainants argue that it has been held by the Supreme Court that in equity interest is allowed or withheld as, under all the circumstances of the case, seems just

and equitable, and they contend that under the facts and circumstances of the instant case the chancellor was justified in allowing interest. In support of this contention they cite Felt v. Bell, 205 Ill. 213; Keady v. White, 168 Ill. 78; Golden v. Cervenka, 278 Ill. 409, and Brimie v. Benson, 216 Ill. App. 474. In Felt v. Bell, supra, a sale was set aside upon the ground of fraud, and interest was allowed from the time the transaction was rescinded. In Golden v. Cervenka, supra, it was held that "the Central Trust Company having received funds which belonged to the trust and savings bank, if it retained them without authority of law, should account for interest from the time a demand was made for payment, which was when the cross-bill was filed." In Brimie v. Benson, supra, the defendant had the use of the property for a number of years and on an accounting it was found that there was due to the complainant from the defendant $2029.81, and it was held that the complainant was entitled, under the facts and circumstances of the case, to interest from the date of the filing of the bill. In Keady v. White, supra, interest was allowed because certain funds had been used. None of these cases supports the contention of the complainants. In the instant case there is no claim of fraud, nor did the defendants have the use of any funds belonging to the complainants, nor are there any facts and circumstances that warrant the decretal order with respect to interest. The decree, therefore, will be modified by striking therefrom that portion of the decree in which it is "ordered, adjudged and decreed, that the defendant, Aaron Bodenweiser, pay to the complainants, interest on said sum of $5,400.00 from the date of the filing of the bill herein, at the rate of Five per cent (5%) per annum," and the decree as thus modified will be affirmed.

DECREE MODIFIED AND AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

194 - 32135

64 P.2d 632

WILLIAM J. LATHAM, Jr., administrator of the estate of William J. Latham, Sr., deceased, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
GREAT NORTHERN CASUALTY COMPANY, a corporation, Appellant.	

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Municipal Court of Chicago William J. Latham, Jr., administrator of the estate of William J. Latham, Sr., deceased, plaintiff, sued the Great Northern Casualty Company, a corporation, defendant, in contract. A jury was waived and the cause was submitted to the court, and the court having heard the evidence found the issues against the defendant and assessed the plaintiff's damages at the sum of $700. Judgment was entered on the finding and this appeal followed.

On November 8, 1937, on plaintiff's motion (accompanied with written suggestions and to which defendant filed counter suggestions), this Appellate Court ordered that the bill of exceptions be stricken. The defendant, in its brief filed on this appeal, assigns no reason why the judgment of the Municipal Court should be reversed - in fact it does not even ask this court to reverse the judgment. It simply prays that this court in its opinion set forth its reasons why the bill of exceptions, or stenographic report, was stricken, so that the defendant may have the Supreme Court review the action of this court in that regard.

WILLIAM T. LUTHER, Jr.,
administrator of the
estate of William T.
Luther, Sr., deceased,
Appellee,

v.

GREAT NORTHERN RAILWAY
COMPANY, a corporation,
Appellant.

Appeal from District Court of Hennepin County.

MR. JUSTICE GILBERT DELIVERED THE OPINION OF THE COURT.

In the municipal court of Hennepin William T. Luther, Jr., administrator of the estate of William T. Luther, Sr., deceased, plaintiff, sues the Great Northern Railway Company, a corporation, defendant, in conversion. A jury was waived and the cause was submitted to the court, and the court having found the evidence found the issues against the defendant and assessed the plaintiff's damages at the sum of $[illegible]. Judgment was entered on the finding and this appeal followed.

On November 8, 1927, the plaintiff's motion (accompanied with affidavits supporting the motion) to vacate (accompanied by suggestions), this appellate court ordered that the bill of exceptions be stricken. The contention, in the order filed on this appeal, assigns no reason why the judgment of the municipal court should be reversed - in fact it does not even ask this court to review the judgment. It simply prays that this court in its opinion its refusal to vacate the bill of exceptions, or alternatively, that plaintiff, on this the defendant and have the judgment court review the action of this court in that regard.

The cause was tried before Judge Frank M. Padden, and judgment was entered on May 31, 1927. The court allowed the defendant sixty days in which to file a bill of exceptions. On July 16, 1927, the defendant appeared before Judge Edgar A. Jonas, one of the judges of the Municipal Court, and obtained the following order: "And now comes the defendant by its solicitor, Roderick M. O'Connor, and having this day presented in open court the stenographic report of the proceedings had in the trial of said court before the Honorable Frank M. Padden, one of the Judges of said Municipal Court, and it appearing to this Court that the said Frank M. Padden is not now sitting and holding Court but is on his vacation and is not now present or available to sign and approve said stenographic report and order same filed, I have this day in the absence of said Judge marked said stenographic report presented in open court, this 16 day of July, A. D. 1927. Edgar A. Jonas, Judge of the Municipal Court of Chicago." The alleged bill of exceptions is not signed by the trial judge or any other judge. Appended to the alleged bill is the following: "I hereby certify that the foregoing document was presented to me in open court to be signed and placed on file in the above entitled cause, this 10 day of Sept., 1927. Frank M. Padden, Judge of The Municipal Court of Chicago." On the same date an order was entered "that the Bill of Exceptions herein presented be and it is hereby approved and ordered filed, nunc pro tunc as of July 16, 1927." A bill of exceptions or stenographic report must be signed by the presiding judge or under certain contingencies by another judge. (Sec. 81, Practice Act, Cahill's Ill. St., Ch. 110. See People v. Lewen, 281 Ill. 308, 312.) It is plain that the signing by the trial judge of the

aforesaid certificate cannot be held to be the signing of a bill of exceptions or transcript of the evidence, within the meaning of the statute, but even if it could be, under the record in this cause, the trial judge had no power or authority to sign it on September 13, 1927. (People v. Rosenwald, 306 Ill. 548; City of East St. Louis v. Vogel, 276 Ill. 490, 494.)

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

aforesaid certificate cannot be held to be the judgment of a full of exception or inadvertent of the [illegible], within the meaning of the statute, and that if it could be, [illegible] in this case, the trial judge has no power to modify or vacate it on September 17, 1957. (Pennie v. [illegible], [illegible] Ill. App. [illegible] Dept 1st; Ingle v. Yount, 176 Ill. App. 492.)

The judgment of the municipal court of Chicago is affirmed.

Burke, P. J., and Crielly, J., concur.

174 - 31785

SIDNEY I. BLUM, Administrator of the Estate of Irma W. Blum, Deceased, Appellant,	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
v.	
YELLOW CAB COMPANY, a corporation, Appellee.	

Opinion filed February 9, 1928.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On September 9, 1924, Irma W. Blum, while crossing Sheridan Road, near Diversey Parkway, Chicago, was struck by a Yellow Cab, belonging to the defendant, the Yellow Cab Company, a corporation, and so seriously injured that, shortly afterwards, she died. On February 8, 1925, Sidney I. Blum, having been appointed administrator of her estate, brought suit in the Superior Court under the "Injuries Act," against the Yellow Cab Company for damages.

The declaration, as it finally stood, contained four charges; first, general negligence in the operation of the Yellow Cab; second, failure to sound the horn or to give any signal to warn the deceased of the approach of the Yellow Cab; third, willful and wanton negligence; fourth, negligence consisting of excessive speed. The defendant's plea became, after various orders, the plea of the general issue. There was a trial before the court, with a jury, and a verdict finding the defendant not guilty, and

on January 23, 1927, judgment entered in favor of the defendant. This appeal is by the plaintiff therefrom.

The evidence on behalf of the plaintiff tended to show that on September 9, 1924, about 6:30 P.M., the plaintiff's intestate (hereinafter called "Irma Blum"), together with her sister, Florence Ginsberg, alighted from a northbound bus on Sheridan Road, a north and south street, at a point about 100 feet north of Diversey Parkway, which crosses Sheridan Road east and west; that where they alighted there was a cement landing; that it was daylight, and the roadway was dry and the weather clear; that after alighting and after waiting for a gap in the north and south bound traffic, they started west to cross Sheridan Road; that when they arrived at the middle of the street, both looked to the north and saw a Yellow Cab coming from the north, approximately 300 feet from where they were standing; that, after seeing the Yellow Cab, they continued to cross the street, walking in a southwesterly direction; that when within five feet of the west curb, they were both struck by a Yellow Cab; that Irma Blum was picked up and taken to the Columbus Memorial Hospital, where she died within an hour; that at the time of the accident, Irma Blum was 35 years old and her eye sight and hearing were in perfect condition; that passengers from north bound buses often crossed the street to the west curb at or about the place in question. On the other hand the evidence of the cab driver, William E. Fue, is that the south bound section of Sheridan Road, ahead of his cab, was clear of traffic at the time in question; that the north bound traffic at that time was

rather heavy, several cars abreast; that he saw Irma Blum and her sister before the accident, but they were then only five or six feet away; that they came out, running, from behind an automobile that was north bound; that they were going in a southwesterly direction; that he was driving just to the right of the center of the road, and when he saw them, he immediately applied his brakes and stopped his cab as quickly as he could; that, when they came out, running, they had hold of each other; that when his cab hit one of them she fell down, and in doing so, knocked the other sister down. On cross-examination, he testified that they were raising more west than south, that their direct sides were towards him; that when Irma Blum fell, she was lying about ten feet from the center of the crown of the road; that the west half of Sheridan Road at that point is about twenty-five feet wide; that after being struck, her body moved a couple of feet straight in front, with her head lying to the west. When asked how far her feet were from the center of the road, he answered, "Well, her feet were four or five feet from the center." He further testified that he was driving between fifteen and eighteen miles an hour up to the time of the collision; that there was no machine ahead of him that he remembered; that his cab, going from fifteen to eighteen miles an hour, would travel from twelve to fifteen feet after endeavoring to stop it as quickly as possible; that he had formerly seen people there, or nearer the crossing, getting off a bus; that the bus-stop was about 100 feet north of the crosswalk; that at the point in question, on the east side of the road there was a concrete slab for passengers of the busses to alight on. When asked if he saw the sisters

until he was right on them, he answered, "I seen them when they came out from behind the traffic, and I was only five or six feet from them." He further testified that that was the first time he saw them; that he did not see them when he was 50 or 100 feet north of them; that he did not remember changing the speed of his cab; that he had no passengers in his cab at the time; that as soon as he saw the sisters come out, he applied the foot-brakes as hard as he could.

The evidence of one Schlam, who was in the advertising business, and who was called for the plaintiff, is to the effect that as he was driving north on the east side of Sheridan Road, he saw a Yellow Cab strike two sisters when they were about four or five feet from the west curb; that at the time, he was almost directly opposite on the other side of Sheridan Road; that at that time there were no other cars coming south; that as the result of the collision, one of the women was thrown over the fender toward the curb, and other fell down on the roadway, in front of the front right wheel, which then passed over her body; that the view he had of the occurrence was through the side windshield of his automobile; that he did not see a motor bus, or any cars north bound on Sheridan Road ahead of him; that at the time in question, Irma Blum and her sister - from the time they were from five to ten feet west of the east curb - "were leisurely walking across the street;" that the Yellow Cab struck the one of the sisters that was furthest south.

The evidence of one Lowenstein, a lawyer, called for the plaintiff, is to the effect that at about the time in

question, he was driving an automobile north on Sheridan Road, just north of Diversey Parkway; that he saw a Yellow Cab strike Irma Blum and her sister; that at the time of the collision they were approximately fifty feet north of the north side of Diversey Parkway, on Sheridan Road; that they were about in the center of the west half of the roadway; that he saw the Yellow Cab at the moment of impact, but did not see any other car going south at the time. When asked if he saw any other cars ahead or behind the Yellow Cab, he answered, "No, as I remember it, the Yellow Cab was practically alone. There were other cars on the street, but they were scattered 50, or 100, or 200 feet apart at that hour." He further testified that he did not know at what speed the Yellow Cab was traveling, as it was going in an opposite direction to him; that Sheridan Road at that point is about forty feet wide.

On cross-examination, he testified that he did not notice any cars ahead of him; that there was not a steady stream of cars ahead of him at that hour; that there never is; that of the cars that were scattered 50 to 100 to 200 feet apart that were coming south, no one was close to the Yellow cab; that probably there were two or three within the block behind the Yellow Cab; that the nearest was somewhere within fifty or 100 feet of the Yellow Cab; that he did not see the Yellow Cab before the impact.

The evidence of Rosengrin, an accountant, who was driving his automobile at the time in question, was to the effect that he was driving about 25 feet behind the

Yellow Cab, both machines going about 30 miles an hour; that he saw two women suddenly appear from the northbound traffic. He testified, "I was driving along behind this Yellow Taxicab, and suddenly it seems I saw two ladies suddenly appear from the north bound traffic, and it all happened in an instant, and came the impact. I saw them tugging at one another before the car struck, just for a flash, one pulling the other one, trying to go in opposite directions; go nowhere." He further testified that when he first saw them, "The taxi must have been about 12 feet away at the time, because I jammed on my brakes instantly;" that the north bound traffic at that time was quite heavy. When asked if they were 12 feet ahead of the taxi when he saw them, he answered, "I estimate about 10 or 12 feet before the Yellow taxicab struck them, when they jumped in front of the car."

The evidence of one Schert, a police officer who was directing traffic near the point in question, was to the effect that the north bound traffic on the evening of September 9, 1924, was very heavy.

It was a calamitous occurrence, and some one was guilty of engligence. Whether the negligence was that of the cab driver, was answered by the verdict of the jury in the negative; and that answer we take as of considerable meaning; in other words, we sanction it, unless we find it is clearly against the weight of the evidence. Does the record disclose that it was? There is evidence which if taken out of its context and considered by itself, tends to exculpate each of the participants. The testimony of the surviving

sister that she and the deceased looked before they started crossing over the west half of the road, and that at that time the Yellow Cab was 300 feet away to the north, taken by itself and believed, sufficiently proves ordinary care upon the partvof the deceased, and, also, proves negligence, by excessive speed, at least, on the part of the cab driver. On the other hand, the testimony of the cab driver - substantially corroborated by that of Rosengrin - that, as he came south, driving on the right side of the road, from 15 to 18 miles an hour, with the west half of the roadway ahead of his clear, but the east side heavy with traffic, the sisters came running out onto the west side of the roadway from behind a north bound automobile, so that he did not see them until he was within five or six feet of them, taken by itself, and believed, proves, at least, contributory negligence on the part of Irma Blum.

The jury evidently concluded that Irma Blum was careless and that the cab driver was not; and there was ample testimony, if believed, to support their verdict. It follows, therefore, that, disadvantageously placed as we are, with only the record before us, we are bound to give effect to the verdict, unless we find such inconsistencies and discrepancies that lead the mind convincingly to the opposite conclusion. We do find contradiction, but the narration of the facts upon which the verdict was in all probability based, is consistent and rational, and if true makes out a complete defense. The testimony as to the exact position of Irma Blum in the road when she was struck is discussed, but if we assume that she and her sister ran out from behind a north bound automobile when the Yellow Cab was but a few feet

away from them, their subsequent actions and that of the Yellow Cab being the result of sudden and great danger, no one can reasonably and surely conjecture in just what way and at just what exact point in the road, east or west, the collision would take place. With the record as it is before us, we do not feel justified in overriding the verdict of the jury.

It is urged for the plaintiff that it was error to permit the cab driver to state why, between the date of the accident and the conclusion of the inquest, he did not drive for the defendant. Counsel for the plaintiff having, upon cross-examination, brought out for the first time that the cab driver did not drive for the defendant from the date of the accident until after the inquest, it was then entirely proper for the defendant to show why, especially as without the facts upon that subject, the jury might have inferred that his employer had concluded that he had been careless.

On the subject of instructions, many objections are made for the plaintiff. On behalf of the plaintiff, the court gave fifteen instructions, and refused nine, and gave, on behalf of the defendant, twenty-five instructions, and refused one; making a total of forty given instructions. That was, obviously, more than was necessary. The practice of giving an excessive number of instructions has been repeatedly condemned. Adams v. Smith, 58 Ill. 417; Daubach v. Drake Hotel, 243 Ill. App. 589. We have examined all of them, however, and are of the opinion, considering that, in its essence, the situation of fact was one of simplicity - quite the opposite of that in Cohen v. Weinstein, 231 Ill. App.

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away from them, their statements making evidence of the
Yellow Dog being the result of motion or lateral dragging,
as the non-commutality was merely suggestive in instances
why and of Jack ever appeared upon the road, and so
well, the multiple [illegible] Jill [illegible]
it is before us, we do not find [illegible] in overturning
the verdict of the jury.

It is urged for the plaintiff in error that
he permit the sub-lease to stand as, between the half of
the accident and the evidence of the [illegible], in his act
there for the defendant. Counsel for the plaintiff having
made [illegible], [illegible] in the lines that
the non-driver did not allow for the [illegible] from the site
of the accident until after the [illegible], it was then entirely
proper for the defendant to move on, consequently he [illegible] the
facts upon that subject, the jury [illegible] that
his assigned had [illegible] been in [illegible] [illegible].

On the subject of instructions, many objections
are made for the plaintiff. The behalf of the defendant,
the court gave fifteen instructions, [illegible] [illegible],
[illegible], on behalf of the defendant, [illegible],
and refused only making a total of [illegible] instructions.
This was, obviously, over that [illegible]. The practice
of giving an economic number of instructions has been
[illegible] condemned. Lemon v. Smith, 5a [illegible], 217; Lawrence v.
Cross [illegible], 203 Ill. App. 328. We have [illegible] [illegible] of
this, however, [illegible] of the opinion, considering this,
in his [illegible], the [illegible] of this was one of [illegible] =
quite [illegible] of this [illegible] Lawrence, [illegible] Ill. App.

84 - and that the chief determining factor was necessarily the matter of credibility, that no such substantial error was committed in the matter of instructions as to justify a reversal.

For the reasons stated above, the judgment will be affirmed.

AFFIRMED.

HOLDOM AND WILSON, JJ. CONCUR.

328 - 31839

JOHN GANAS, Appellee, v. PETER PAPPAS, et al.,	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
On appeal of GEORGE VATSINEAS, Appellant.	

Opinion filed Feb. 9, 1928.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On June 29, 1923, Costas and Kallans gave a chattel mortgage, securing a note for $2,200.00, payable in installments, upon certain personal property used for a restaurant, located at 5967 West Chicago avenue, to Chas. Bender Co. It was recorded on the same day.

On October 15, 1924, one Karaleskas gave a chattel mortgage, securing 24 notes of $100.00 each, covering the restaurant chattels, good-will and leasehold of the same premises, to Vatsineas, a defendant (here the only appellant). This mortgage contained a power of sale, with or without notice, at public or private sale. It was recorded on the day it was given.

On February 6, 1925, Karalekas, claiming to own the restaurant at 5967 West Chicago avenue, gave a chattel mortgage on the personal property of the restaurant, to secure the sum of $1,200.00 to Ganas, the complainant,

TRO - 21820

[illegible],

Appellee,

v.

[illegible] et al.,

On appeal of
[illegible]

Appellees.

Opinion filed Apr. 5, 1966.

Mr. [illegible] Dixon delivered the opinion of the court.

On June 23, 1965, Orion and Pallone gave a chattel mortgage, covering [illegible] for $[illegible], payable in installments, upon certain personal property upon the premises, located in [illegible] Grove, in Cook County. It was recorded on the same day.

In October 15, 1964, one Lauritzen gave a chattel mortgage, covering 24 sets of [illegible] tools, covering the premises described, [illegible] the handbill of the same plaintiff, to [illegible] (here the only appellant). This mortgage contained a power of sale, with or without notice, if default in [illegible] sale. It was recorded on the 27 [illegible].

On February 2, 1965, [illegible], claiming to [illegible] the [illegible] Grove [illegible], gave a [illegible] mortgage on the personal property of the [illegible], to secure the sum of $[illegible] to [illegible], for [illegible].

but gave him only six notes of $100.00 each to secure a total sum of $600.00. This mortgage was recorded the next day.

There were several other small mortgages, upon various portions of the same personal property, one on some linen, one on a refrigerator, and one on a cash register, which were priorntot those of the complainant, Ganas, and the defendant, Vatsineas. They secured, altogether, about 170.00.

Karalekas failed to pay Ganas, the complainant, the $600.00, due on his notes; and on September 9, 1925, Ganas obtained judgment, by confession, upon his notes, in the sum of $778.40 and costs against Karalekas; and upon the judgment, execution was issued and later returned, no property found.

From the evidence the learned Chancellor made the following findings:

> that said Peter Pappas, George Vatsineas, Mercantile Laundry & Linen Supply Co., and their agent and attorney, Demetrios Tasiopoulos, knew that said Peter Karalekas executed the aforesaidnchattel mortgage to secure his indebtedness to John Ganas;
>
> that George Vatsineas, by and through his attorney and agent, Demetrios Tasiopoulos, agreed to sell on July 30, 1925, to Nick Andrews, the aforesaid property and restaurant for $5,000, free and clear ofall liens and the claims of all persons; that he agreed with Nick Andrews to go through the formality of a pretended foreclosure chattle mortgage sale, and sell the property at a pretended auction sale to Peter Pappas, who is associated with George Vatsineas as co-director of the Mercantile Laundry & Linen Supply Co., that on July 30, 1925, said Demetrious Tasiopoulos, as agent for said George Vatsineas, agreed to sell said property to Nick Andrews for $5,000;
>
> that on July 31, 1925, Demetrios Tasiopoulos, the attorney and agent of George Vatsineas, pasted a written notice of a pretended chattel mortgage foreclosure

but gave him only six notes of $500.00 each to secure a total sum of $3000.00. This mortgage was recorded the next day.

There were several other evidences, such various portions of the same personal property, one on some linen, one on a refrigerator, and one on a mesh rejector, which were substitutes for those of the complainant, Gamma, and the defendant, Vitalbeno. They secured, altogether, about $70.00.

Karslebos failed to pay Gamma, the complainant, the $3000.00, due on his notes, and on September 8, 1928, gamma obtained judgment, by confession, upon his notes, in the sum of $3178.40 and costs against Karslebos; and upon the judgment, execution was issued and later returned, no property found.

From the evidence the learned Chancellor made the following findings:

> that said Peter Tempra, George Tranimous, Amerstile Laundry & Linen Supply Co., and their agent and attorney, Dmetrius Tmelopulos, knew that said Karslebos already secured the aforementioned mortgage to secure his indebtedness to John Gamma;
>
> that George Vasilakes, by and through his attorney and agent, Demetrios Tmelopulos, agreed to sell on July 30, 1928, to the defendant, the aforesaid property and mechanical for $3,000, free and clear of all liens, and the claims of all persons; that he agreed with said Karslebos to go through the formality of a purported foreclosure sheriffs mortgage sale, and sell the property at a purchasing price to Peter Tempra, who is associated with George Tranimous as co-director of the Amerstile Laundry & Linen Supply Co., that on July 30, 1928, said Demetrios Tmelopulos, as agent for said George Vasilakes, agreed to sell said property to said Karslebos for $3,000;
>
> that on July 31, 1928, Demetrios Tmelopulos, the attorney and agent of George Vasilakes, issued a sheriffs mortgage sale, and said Karslebos purchased the property for $3,000;
>
> that said Peter Tempra, George Tranimous, Amerstile Laundry & Linen Supply Co., and their agent and attorney, Demetrios Tmelopulos, knew that said Karslebos already secured the aforementioned mortgage to secure his indebtedness to John Gamma;
>
> that George Vasilakes, by and through his attorney and agent, Demetrios Tmelopulos, agreed to sell on July 30, 1928, to the defendant, the aforesaid property and mechanical for $3,000, free and clear of all liens, and the claims of all persons; that he agreed with said Karslebos to go through the formality of a purported foreclosure sheriffs mortgage sale, and sell the property at a purchasing price to Peter Tempra, who is associated with George Tranimous as co-director of the Amerstile Laundry & Linen Supply Co., that on July 30, 1928, said Demetrios Tmelopulos, as agent for said George Vasilakes, agreed to sell said property to said Karslebos for $3,000;
>
> that on July 31, 1928, Demetrios Tmelopulos, the attorney and agent of George Vasilakes, issued a sheriffs mortgage sale, and said Karslebos purchased the property for $3,000;

sale on the ice box in the kitchen in the rear of the premises known as 5967 West Chicago avenue, Chicago, Illinois; that said notice was covered with a coat so that it could not be seen; that a notice was affixed on the vestibule door in the front of the premises, which was on August 3, 1935, placed on the front window of said premises; that no other notice of the foreclosure sale was posted by the mortgagee or his agents;

that Nick Andrews went into possession of said property pursuant to the agreement of Demetrios Tasiopoulos;

that Demetrios Tasiopoulos, as the attorney and agent of said George Vatsineas, on August 4, 1935, at 4:00 o'clock p.m., went through with and made a pretended auction sale; that he acted as the agent of George Vatsineas and as his auctioneer and sold the property at auction; that he offered said property at auction separately and not having received sufficient amount for said property he offered the same in bulk, including the leasehold for the aforesaid premises, and received the highest bid from Peter Pappas, one of the defendants, of the sum of $1,000, and that he sold said property to said Peter Pappas for the sum of $1,000;

that Peter Pappas is co-director with George Vatsineas for the Mercantile Laundry & Linen Supply Co., a corporation; that he became the purchaser at said pretended auction sale as the agent of George Vatsineas in pursuance to an understanding and agreement had and entered into with said George Vatsineas and his attorney Demetrios Tasiopoulos, prior to the time of said pretended auction sale.

that on July 30, 1935, Nick Andrews paid Demetrios Tasiopoulos $500 in part payment of the purchase price of $5,000 for said property; that immediately after the pretended auction sale Nick Andrews paid said Demetrios Tasiopoulos the additional sum of $575; and immediately after the pretended auction sale the property aforesaid was delivered to said Nick Andrews, and that on the same or the next day said Demetrios Tasiopoulos wrote and drew up all the papers and documents for the purchase and sale of said property.

that Demetrios Tasiopoulos was the agent and attorney of said George Vatsineas, Peter Pappas and Nick Andrews, and acted as their attorney and agent at the same time throughout the carrying on of the pretended foreclosure and sale and executed all documents in connection therewith for all parties concerned; that said property was sold to said Nick Andrews by means and through the pretended foreclosure sale aforesaid;

walk on the ice now in the vicinity of the west of the premises known as 5227 Jeffrey Avenue, Chicago, Illinois; that said boys were wearing with a coat so that it could not be seen; that a notice was affixed on the vestibule door in the front of the premises, which was on August 6, 1929, placed on the front window of said premises; that no other notice of the inadequacy was posted by the owner, or his agents;

that such failure was the proximation of said property pursuant to the ordinance of Municipal Code;

that Beatrice Washington, is the attorney and agent of said Jerome Fishman, on August 6, 1929, at 4:30 o'clock p.m., went through a, 2 and made a prescribed written note; that he noted on the agent of George Washington and on the premises and said the property at Jeffrey, that he offered said property at auction improperly and not legally written sufficient amount for said property to offered the same in bid, including the tenants for the aforesaid premises, and overlooked the right not bid from front (name) due of the defendants at the sum of $1,000, and that the said said property is said rent owned for the sum of $1,000;

that water figures in un-fairness with George Washington for the personalis in duty i also in Co., a corporation; that he became the attorney at said property owners only in the right of George Washington in consequence to be understanding and agreement had and arrived into with said Jerome Washington and in attorney Jerome Washington, prior to the time of said previous auction sale;

That on July 30, 1929, Jack Lipson paid Jerome Washington $500 in part payment of the purchase price of $1,000 for said property; that immediately after the prescribed auction sale Lipson paid Jerome Washington the balance due of $500, and immediately after the prescribed auction sale the property allegedly purchased on said auction sale, and that on the same or the next day said Jerome Washington wrote and deliver to Lipson the deed for said property.

That Jerome Washington was by reason and after-ney of said Jerry Fishman, (John Lipson and also agent, and which is clearly evidence and shown as the year that Jerome was working on of the irregular-ities and facts and notated of Jerome Washington, in connection therewith, that said property was sold to said Jerome Washington and through the prescribed irregular sale alleged;

that Peter Pappas pursuant to his agreement with George Vatsineas, Demetrios Tasiopoulos and Nick Andrews, executed a bill of sale conveying the aforesaid property to Nick Andrews on August 5, 1925, and on the same day Nick Andrews executed a chattel mortgage covering the aforesaid property to said Peter Pappas to secure the payment of his notes for the purchase of said property in the amount of $3,925;

that John Ganas did not have any notice of said pretended foreclosure on July 31, 1925, and of said pretended auction sale on August 4, 1925, and was not given an opportunity to redeem from the mortgage foreclosure sale by said George Vatsineas;

The final decree ordered that judgment be entered in favor of Ganas and against Vatsineas, the defendant, in the sum of $533.33, and costs, and that the cause be dismissed as to Pappas, Andrews, Mercantile Laundry & Linen Supply Company and Karalekas. This appeal is from that decree. Able briefs have been filed on both sides.

The bill of complaint was filed on September 22, 1925, and charged fraud and conspiracy on the part of the defendants, and asked that they account for what they made as a result of the pretended foreclosure and sale, or return the property, or failing to do so, that a money decree be rendered sufficient to satisfy the complainants' judgment against Karalekas.

Considering the evidence, we agree with the conclusion of the Chancellor. A fraud was perpetrated at the expense of the complainant and, at a minimum, he was entitled to recover the amount he had paid out, and which the property had been mortgaged to secure. It is true that Karalekas was not a party to the suit, but he was not necessary. The decree is based on the fraud of Vatsineas and others. It is

not, technically, a bill to foreclose or redeem, it is based upon the broad principles of equity that he who with others conspires to cheat another out of his rights in personal property may be sued and required either to give up the property itself or in failure of that be mulcted in damages.

In such a case there is no adequate remedy at law, and in such a case, as no claims are pursued against the original mortgagor, he is not a necessary party. Here the complainant had judgment against Karalekas, the mortgagor, and execution had been returned no property found. There was no further need of prosecuting him. The complainant's case was that certain personal property, in which he had an interest, had been fraudulently appropriated by Vatsineas and others, and that his rights therein ought to be recognized and confirmed, or the wrongdoers ordered to pay him the amount they had caused him to lose. It was urged for Vatsineas throughout the trial that the foreclosure was regular. If it was regular, then, obviously, the mortgagor had lost his equity, and the defendant, here, Vatsineas, is not entitled to set up any rights on the part of the mortgagor, whatever they may be, for redemption or otherwise, as a defense to the complainant's claim of fraud. Sperry, Watt & Garver v. Ethridge, 70 Iowa 27; Frisbee v. Langworthy, 11 Wis. 383; Smith v. Woolbaugh, 21 Wis. 433; Hull v. Godfrey, 31 Neb. 804; Treat v. Gilmore, 49 Me. 34; Mowry v. The First Nat'l Bank of Baraboo, 54 Wis. 38. The complainant might have brought suit at law, but considering the charges and what the proof showed, the only adequate and appropriate remedy was in equity.

not, tendinously, a bill in Chancery or redeem, it is based upon the broad principles of equity that he who with clean hands requires to seek support and of his rights in personal property may be used not required either to give up the property itself or in default of that be molested in court.

In such a case there is no concrete remedy at law, and in such a case, as in claims for contract against the original mortgagor, he is not a necessary party. Here the complainant had judgment against Kirkpatrick, the mortgagor, and execution had been returned no property found. There was no further need of prosecuting him. The mortgagee's case was that which affects personal property, in which he had an interest, and the Kirkpatrick, represented by defendants and others, and that the plaintiffs might be in possession and entitled, or the plaintiffs claimed to pay him the amount they had caused him to lose. It was urged for Tennessee Bituminous Co. that the foreclosure was regular. If it was regular, then, obviously, the mortgagor had lost his equity, and the Kirkpatrick, Smith, Watkins, is not entitled to set up any rights on the part of the mortgagor, however they may be, for redemption or otherwise, as a defense to the complainant's claim of right. Smith, Pain & Weaver v. Kirkpatrick, 70 Tenn 97; Pritchard v. Lawrence, 71 Ala. 170; Cain v. Bullard, 71 Ala. 492; Ellis v. Taylor, 11 Iowa 204; Trust v. Gilmore, 49 Ia. 50; Carter v. The First Nat'l Bank of Lexington, 11 Kan. 80. The complainant might have brought suit at law, but considering the charge and very the proof showed, the only adequate and appropriate remedy was in equity.

Inasmuch as the complainant sought to make Vatsineas account for the surplus profits he made out of the fraudulent foreclosure and sales of the property, and so to account for the property he converted and misappropriated to his own use, his most appropriate remedy was by bill in equity, based, in reality, on the fraud of Vatsineas and his accomplices. Glass v. Downs, 15 Ill. App. 86.

It is urged for Vatsineas that the evidence does not show that the complainant made a sufficient tender of what was due before filing his bill. The complainant claims that he did make a tender of the amount due, to Vatsineas, about August 13, 1925. He so testified; that he would pay him, Vatsineas, the amount of the mortgage, expenses and rent. We do not think, however, that a tender of any kind was necessary. Vatsineas claimed the sale was bona fide, and if so, then a tender would be superfluous; and, further, his refusal, considering the situation of the property, made it unnecessary that the tender should throughout be maintained.

It is urged for Vatsineas that the Chancellor erred in finding that Vatsineas made a profit out of the sale of the property; that the error arose from considering the value of the leasehold as part of the credit to be given to Vatsineas's claim. That was entirely proper. The court said in Inglehart, et al v. Crane & Wesson, 42 Ill. 261,

> "where there are two creditors standing in equal equity, one of whom has security upon two funds and the other upon only one of the two, the former is required to proceed primarily against the fund upon which the latter has no claim."

Inasmuch as the complainant sought to make Vatsineas account for the surplus realized by him out of the fraudulent transferee and sales of the property, and so to account for the property he conveyed and misappropriated to his own use, his only appropriate remedy was by bill in equity, based, in reality, on the fraud of Vatsineas and his accomplices. Gillett v. Moody, 12 Ill. App. 50.

It is urged for Vatsineas that the evidence does not show that the complainant was a creditor because of what was due before filing the bill. The complainant claims that he did make a tender of the amount due, to Vatsineas, about August 17, 1933, at an auction that he would pay him, Vatsineas, the amount of the mortgage, expenses and cost. [illegible] Vatsineas refused, [illegible] a tender of any kind was necessary. Vatsineas claimed the sale was bona fide, and if so, then a tender would be unavailing; and, further, his refusal, considering the situation of the property, made it unnecessary that the tender should actually be in existence.

It is urged for Vatsineas that the chancellor erred in finding that Vatsineas made a profit out of the sale of the property; that the court erred in allowing the value of the leasehold as part of the profit, to be given to Vatsineas's claim. That was properly proved. The court cited to [illegible], et al. v. [illegible], 9 Ill. 492.

"Where there are two creditors claiming in equal equity, one of whom has security upon two funds and the other upon only one of the two, the former is required to proceed primarily against the fund upon which the latter has no claim."

In our judgment the court had jurisdiction and the evidence fully justified the decree. The decree, therefore, will be affirmed.

AFFIRMED.

MOLDOM AND WILSON, JJ. CONCUR.

35 - 31938

ARNT JOHNSON, Plaintiff in Error, v. DR. J. V. FOWLER, Defendant in Error.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

Opinion filed Feb. 9, 1928.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

The record before us shows that on November 26, 1926, the plaintiff in error took an appeal from an order of the trial judge, and on January 13, 1927. filed an appeal bond.

That on March 14, 1927, he sued out a writ of error in the same cause;

That on November 9, 1927, the defendant in error moved to dismiss the writ of error;

That on November 14, 1927, the plaintiff in error moved to dismiss the writ of error, and, on the same date, filed a short record, including the final order and judgment, the appeal bond, and its approval;

That on November 18, 1927, the plaintiff in error's motion to dismiss was denied;

That on November 25, 1927, the defendant in error's motion to dismiss was denied;

In further considering the matter, we are now of

No. 12-1207

MARY JOHNSON,

Petitioner,

v.

UNITED STATES.

Respondent.

Opinion filed Feb. 9, 1988:

Mr. Justice Powell delivered the opinion of the court.

The record fully supports the finding that on January 26, 1980, the petitioner is very close to death from an overdose of the total drugs, and on January 27, 1980, she was pronounced dead.

That on June 12, 1980, petitioner filed a claim for error in the same court;

That on December 3, 1981, the petitioner filed motion to dismiss the claim of error;

That on November 21, 1982, the petitioner filed motion to dismiss the claim of error, and on 27, June 1983, filed a short record, indicating no final order and judgment, the record read, and its counsel;

That on January 12, 1987, the petitioner in error's motion to dismiss was denied;

That on January 26, 1987, the petitioner in error's motion to dismiss was denied

the opinion that the motions to dismiss the writ of error should have been allowed; the reason being that on November 14, 1927, when the writ of error was sued out, an appeal was then pending in the same cause, the bond having been approved on January 13, 1927, and as a result, there was no cause at that time pending in the trial court upon which the writ of error sued out could take effect. Sinclair v. Sinclair, 224 Ill. App. 130.

The orders of November 18 and November 25, 1927, above mentioned, will be vacated and set aside, and the motion of the defendant in error to dismiss the writ of error will be allowed.

WRIT OF ERROR DISMISSED.

HOLDOM AND WILSON, JJ. CONCUR.

65 - 38001

247 I.A. 638

CAROLINE FAXON, Plaintiff in Error,	
v.	ERROR TO CIRCUIT COURT, COOK COUNTY.
W. J. SLOAN, Defendant in Error.	

Opinion filed Feb. 9, 1928.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On January 18, 1926, Caroline Faxon, as plaintiff, brought suit in the Circuit Court, against W. J. Sloan, as defendant, for damages for personal injuries claimed to have been the result of the negligent operation of a motor vehicle belonging to the defendant which collided with an automobile in which the plaintiff was riding.

A summons was issued and served on the defendant on January 18, 1926.

On January 21, 1926, the plaintiff filed a declaration, consisting of seven counts.

On February 15, 1926, the defendant pro se filed a plea of the general issue, and a plea setting up that at the time in question he was not in possession of the automobile, and that the automobile was not then under his control.

On July 19, 1926, the plaintiff filed a replication to the just mentioned plea.

On April 12, 1927, the record shows the following: "This cause being called for trial ex parte, comes the plaintiff to this suit by her attorney and issues being joined, it is ordered that a jury come;" that "after hearing all the evidence adduced," the jury found the defendant guilty and assessed the plaintiff's damages at the sum of $1500.00. It further shows that judgment was then entered upon the verdict.

On May 10, 1927, Simons & De Bouchet, attorneys, who had not entered their appearance, or appeared in the case before, filed a "motion in the nature of a writ of error coram nobis," for the defendant, asking that the judgment of April 12, 1927, be vacated and set aside; and filed therewith affidavits by De Bouchet, Norby and the defendant himself.

On May 16, the plaintiff, by her attorneys, filed a demurrer to the above mentioned motion, stating that the matters set forth in support of the motion were not sufficient in law.

The defendant then moved the court to overrule the demurrer to the defendant's motion, and that was allowed, to which ruling the plaintiff excepted. The court then vacated the judgment and set aside the verdict, to which ruling, also, the plaintiff excepted. The court then set the cause down for trial on June 27, 1927. The plaintiff excepted thereto, and prayed an appeal from the order of the court overruling her demurrer and vacating and setting aside the verdict, and setting the cause down for trial, to the Appellate Court. On July 29, 1927, the defendant sued out a writ of error to this court.

With the record in that state, the matter is here for review.

The chief error assigned is that the trial court erred in allowing the motion of the defendant in error to vacate and set aside the verdict and judgment of April 12, 1927.

From the above statement, it will be seen that the matters involved arise under Section 89 of the Practice Act; and the question is whether the affidavits in support of the motion of May 10, 1927, show that such errors in fact were committed in the proceedings which could be corrected by a writ of error coram nobis at common law.

In Marabia v. Thompson Hospital, 309 Ill. 147, the court said:

> "The errors which may be corrected by the court upon a motion of this kind are such errors in fact as could have been corrected by a writ of error coram nobis at common law. This writ was allowed at common law for the purpose of revoking a judgment for some error in point of fact, and not in point of law, not appearing on the face of the record, as where the defendant, being a minor, appeared by attorney, or the plaintiff or defendant was a married woman at the time of commencing the suit or died before judgment, or for some error in the process, or through the default of the clerk. The writ of error coram nobis will not lie for error or mistake of the judges in point of law, but a writ of error must be sued out of the Superior Court to correct such error. (2 Tidd's Practice, "1136-37)"

In that opinion, illustrative of the practice concerning such motions, the following cases are cited: Mitchell v. King, 187 Ill. 482, Cramer v. Illinois Commercial Men's Assn., 280 id. 516; People v. Noonan, 278 id. 480, and Chapman v. North American Life Ins. Co., 292 Ill. 179.

In that opinion the court further said,

The court error analysis is not the final merit error in allowing the motion of the defendant in error to vacate and set aside the verdict and judgment of April 10, 1967.

From the above statement, it will be seen that the matters involved raise under Section 52 of the Jurisdiction Act, and the question is whether the District Court in support of the motion of May 10, 1967, show that such error in fact was committed in the proceedings. [illegible] of a writ of error coram nobis at common law.

In Bucklew v. Commonwealth, 201 Ky. 147, 147, the court said:

> "The strong rule may be interpreted in the court upon a motion of this kind are such errors in fact as would have been corrected by a writ of error coram nobis in common law. This writ was allowed by common law for the purpose of correcting a judgment for some error in fact, in cases of this, and not in point of law, not appearing on the face of the record, to which the defendant, being a minor, appeared by attorney, or the plaintiff or defendant was a married woman at the time of commencing the suit or died before judgment, or for some error in the process, or through the default of the clerk. The rule of error coram nobis will not lie for error or mistake of the judge in point of law, but a writ of error must be sued out of the superior court to correct such error. 14 Ky.Law Rep. 771."

In that opinion, illustrative of the problem concerning coram nobis, Mr. Justice Hines set forth. Bucklew v. Kirk, 147 Ky. 408, Jones v. Illinois Cent. R.R. Co., 200 Ky. 16, 252; Moore v. Brown, 270 Ky. 484, 488, and Bucklew v. Kirk, supra, 147 Ky. 408, 411.

In that opinion the court further said,

"The errors of fact which could be made the basis of such a writ and can now be made the basis of a motion were not errors upon such questions of fact as arose upon the pleadings in the original case, or questions of fact averred in the pleadings upon which issue might have been taken, or such questions of fact as constituted the basis of the cause of action or defense upon the merits of the case or might have been pleaded as a defense to the merits. They were questions of the character mentioned in the cases or by the text-writers where the writ has been discussed as a means of correcting errors in the same court, and referred to the disability of parties, the incapacity of the plaintiffs to sue or the disability of the defendants to defend, such as infancy, coverture, death of one or more of the parties, death of a joint party, insanity. Any of these facts, if known to the court, would prevent the entry of a judgment, and it is to error arising out of lack of knowledge by the court of such facts that the writ of error coram nobis, or the motion which is its substitute, applies, and not to lack of knowledge on the part of the court of facts constituting a cause of action or a defense to it."

It is, therefore, only such errors of fact as do not appear upon the face of the record which might have been cured by the writ of error coram nobis, that may now be cured under Section 83 of our Practice Act.

The particular matters involved here and which are set up in the affidavits, give rise to the question whether when a case is reached on a first call and the trial judge sets it down for a day certain that is an error of law, or is such an error of fact, as to justify its correction by a motion in the nature of a writ of error coram nobis. Counsel for the defendant in their brief state that such a setting for trial may be the result of both an error of fact and an error of law; that the mere commission of an error of law certainly cannot ipso facto preclude the commission of an error of fact also; that similarly, an error of law in setting a case for trial in

"The errors of fact which may be made by people of such a with are not one to make the jurisdiction of a nation were not crucial and reversing of fact or error from the standpoint in the original case, or questions of law material to the judgment upon which issue might have been given, or such application of law as constituted the basis of the matter of action or defense upon the merits of the case or might have clearly in a decision in the merits. They were questions of law or constructions claimed in the cases on by the backwoodsmen where the writ has been dismissed as a means of correcting errors in the same court, and referred to the classification of pleadings, the insufficiency of the plaintiff to use as the ground of the decision, to determine, such as interest, ownership, lack of the use of the partial, lack of a line proof, insanity. Any of these facts, if known at the moment, would prevent the entry of a judgment, and it is to error similar not of fact of knowledge by the court at such time. The rule of error common cases, or the action which is the substitute, suitable, and not to back of knowledge on the part of the court of fact constituting a cause of action or a defense to it."

It is, therefore, only such errors of fact as do not appear from the face of the record which might have been cured by the writ of error coram nobis, but may not be cured under Section 6 of the statutes act.

The particular matters involved here relating are not in the affidavits, but rather to the question whether when a case is remanded on a first call and the trial judge sets it down for a day certain that it or error of law, or is such in error of fact, or is merely the correction by a motion or the motion of a mere of error coram nobis. Counsel for the plaintiff in error insist that when the writ was a petition for total day for the remedy of has an error of fact and an error of law, that the error consideration of an error of law clearly omitted here. Under reading the consideration of an error of fact that not similarly, an error of law is adding a year for trial in

violation of the rules of court or statute, may be due to the court first having committed an error of fact, which is not apparent on the face of the record, and that it is that error of fact which the present motion is aimed at; that in this case the court on first call, in the presence of only one party, set the case specially for trial on a day certain, so that the same was tried before its number was ever reached on the trial call; that the error committed was that the court at the time it entered the order setting the case specially, supposed the fact to be, either that both parties were present, or represented in court, or that the motion by counsel for the plaintiff that the case be specially set, was made after notice served on the other party, or by virtue of some agreement to that effect existing between the parties or their attorneys; that as no such agreement, in fact, existed and no notice had ever been served, and only one party was present or represented, that the court was guilty of a commission of an error of fact.

The affidavit of De Souchet, one of the attorneys for the defendant, contains the following:

> "That through some inadvertence, misprison or error, this cause when called on first call on the date aforesaid was specially set for trial on a day certain, and this in the absence of the defendant or anybody representing him. That no notice of such setting was ever given this affiant or his office and that he had no knowledge of the same. That the above procedure in trying said case out of its numerical order in the absence of agreement between the parties or notice to both parties, or their representatives, was in violation of Rule 24 of this Court and of Section 21 of the Practice Act of the Revised Statutes of Illinois, and was due to some error of fact, the exact circumstances surrounding which are unknown to this affiant, for the reason that he was not present when such error was committed and that the same does not appear from the face of the record herein."

The statement by counsel for the defendant that no notice was given to him, is not chargeable to the plaintiff or the plaintiff's attorneys, because at the time of the setting of the case, the defendant was not represented by counsel, but acted as his own lawyer, and had merely filed a plea signed, "W. J. Sloan pro se."

Further, the statement that the trial of the case out of its numerical order was in violation of Rule 24 of the Court and was due to some error of fact, that the exact circumstances surrounding it were unknown to De Bouchet, who became one of the attorneys for the defendant after the entry of the judgment, certainly is not a showing, of any kind, of an actual error of fact, but, rather, an admission that if there was an error of fact he did not know what it was.

In the additional affidavit of De Bouchet, the following is stated,

> "Affiant further states that on, to wit: October 14, 1926, when said case was called on first call, this court, as this affiant verily believes, was erroneously of the opinion either that both parties to this suit were present or represented in court, or had agreed that the case should be specially set for trial. That such was not the fact. That when this case was called on first call neither the defendant nor any one representing him were present in court. That this affiant was not present in court because he wished said cause to be marked for trial, which wish rendered his appearance at court on first call unnecessary. That neither this affiant nor defendant nor anyone for him, had had any agreement, communication, or understanding with plaintiff, plaintiff's counsel, or anyone representing the plaintiff, that this case should be specially set for trial or advanced out of its numerical order on the trial calendar.
>
> That if said facts as above set forth had been known to the Court at the time of the entry of the judgment herein, they would have prevented and deterred this court from entering said judgment or allowing the same to be entered, as the affiant verily believes."

Was the setting of the cause when it was called on the first call for a day certain on January 10, 1927, out of its numerical order, an error of fact? We do not think it was. The case was at issue; the defendant had appeared and filed a plea, and the court saw fit to set it down for a day certain; in doing that, he exercised his judgment. What he did, he intended to do, and there is no sufficient reason for assuming that it was done otherwise; or that he had in mind the facts to which counsel for the defendant referred.

It is sometimes difficult to draw the line between errors of fact and errors of law, as these matters come within the scope of Section 89 of the Practice Act; still, we know of no case that even suggests that such a situation as the one here involved would justify correction by a motion under Section 80 of the Practice Act. The most that can be said of the action of the trial judge is that he erred in his judgment as to the rules of procedure, and erred in their application. And that was all conduct involving matters of law. Counsel urge that it may be considered both as a matter of law and as a matter of fact. That may be true if viewed simply as a question of dialectics, but it is not true in the eyes of the law when considering Section 89 as a practical matter of procedure.

If the record shows any substantial error of law, the defendant has an appropriate remedy, if pursued in apt time, by appeal or writ of error.

For the reason stated, the order of the trial judge vacating the judgment of April18, 1927, will be reversed

Has the wording of the norm even if was called on the first call for a day certain on January 1st, 1987, out of the unwarranted and, or error of fact. We do not think it was. The case was at issue, all witnesses had appeared and filed a plea, and the court was fit to set it down for a day certain in their week, in exercise his judgment. That he did, he intended to do, and there is no sufficient reason for reversing that it was done otherwise; or that by but so what the Trial is with respect for the individual referred.

It is unfounded difficulty to draw the line between errors of fact and errors of law, at least matters from within the scope of Section 84 of the Trial Act, still, we know of no case that ever suggests that and a distinction as the one here involved could justify correction by a motion under Section 84 of the Criminal Act. Yet most that can be said of the results of the said judge is that he erred in his judgment as to the rules of procedure, and erred in their application. And that was all involving matters of law. Counsel says that it may be allowed both as a matter of law and as a matter of fact. That may be true if valued simply in a question of definition, but it is not true in the eyes of the law when considering Section 84 as a practical matter of procedure.

If the trial Judge was mistaken, even of law, he, the defendant has an appropriate remedy. It proceed in the time, by appeal or writ of error.

For the reason stated, the order of the trial judge granting the "motion" of counsel, 1987, will be reversed

and the cause remanded, with directions to expunge that order, and permitting the original judgment of that date to remain in full force and effect.

REVERSED AND REMANDED WITH DIRECTIONS.

HOLDOM AND WILSON, JJ. CONCUR.

132 - 32073

ANDREW LINK, Appellee, v. CITY OF CHICAGO, a Municipal Corporation, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

Opinion filed Feb. 9, 1928.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is an action on the case brought by Andrew Link, as plaintiff, against the City of Chicago, defendant, to recover damages on account of personal injuries alleged to have been sustained on March 1, 1925, by reason of a defective curb near the northwest corner of Thirty-seventh street and Ashland avenue, Chicago. There was a trial by jury, and a verdict and judgment for the plaintiff in the sum of $1500.00. This appeal is from that judgment.

No brief has been filed on behalf of the plaintiff.

The evidence of the plaintiff is to the following effect:- "On March 1, 1925, I was down to visit a friend at 3826 Ashland avenue. Mr. Weiss went with me. We remained thereuntil about 10:30 that night. When we left his house we went to the northwest corner of Thirty-seventh and Ashland avenue. It was an awful cold day, raining and half sleeting; snow flurries. We remained at the corner of Thirty-seventh and Ashland about five minutes, when the first car came along on Ashland avenue, going south. The car passed

ANDREW LINK,

Appellee,

v.

DIT'S OF MIAMI, a Louisiana Corporation,

Defendant.

Appellant.

On Appeal from Civil Ten. 9, 1966.

Mr. Justice Moore delivered the opinion of the court.

This is an action on the case brought by Andrew Link, as plaintiff, against the city of Miami, defendant, to recover damages on account of personal injuries alleged to have been sustained on April 1, 1966, by reason of a defective curb near the northwest corner of Thirty-seventh street and Ashland avenue, Miami. There was a trial by jury, and a verdict and judgment for the plaintiff in the sum of $[illegible]. This appeal is from that judgment.

No brief has been filed on behalf of the plaintiff.

The evidence of the plaintiff is to the following effect:- "On March 1, 1966, I was down to visit a friend at 3800 Ashland avenue. Mr. Moore went with me. We returned therefrom about 10:30 that night. When we left the house we went to the northwest corner of Thirty-seventh and Ashland avenue. It was an April cold day, raining and half sleeting; snow flurries. We returned to the corner of Thirty-seventh and Ashland about five minutes, when the first car came along on Ashland avenue, going south. The car passed

us up, and we had to wait for another car. While we were waiting for the car we were standing on the outside when the first car passed by, and we went to take shelter on the northwest corner of Ashland. We waited for the other car to come along. The other car came along in about ten or fifteen minutes. Mr. Weiss stepped out first, and I followed him, and as I got to the corner I stepped on the curb, and stepped into a hole, and fell back and broke my leg."

The evidence of one Weiss, for the plaintiff, is to the following effect:-

"I have known the plaintiff about 38 years. We stood at the corner, we went out in the street and the first car passed by, and I told Mr. Link to step back, there was a vacant store on the corner and we would shelter from the cold. We stood there, and I says, 'When the next car comes I am going out and stop the car and you follow me.' I ran out to stop the car and told him to follow and he did, and when I stopped the car he was lying by the hole there by the curb, half across the hole and half across the sidewalk." When asked to describe the hole, the witness answered, "It was kind of a cave, broken cave in - broken cave in the sidewalk, broke, like a chipped place, pieces broken out all around, like a half a dish, you know." The plaintiff and Weiss were the occurrence witnesses who testified. There is evidence in the record which shows that in the parkway space near the curb, there is a City water hydrant, which extends about one and one-half feet above the ground, and that in front of the hydrant a stone in the curb is cut away, leaving a gap in the curbstone about two feet

me up, and we had to wait for another one. While we were waiting for him we so were crowding on the moving ship the first one passed by, and we were in the middle of the northwest corner of Ashland. We waited for the other one to come along. The other one came along and we got on it and we got to the corner I alighted at the park, and stepped into a hole, and fell down and broke my leg.

The evidence of the three, Dr. McLaughlin, is to the following effect:-

"I have known the plaintiff about 27 years. He stood at the corner, he went out in the street and the first car passed by, and I told him that it was dark, there was a vacant store on the corner and we could shelter from the cold. He didn't hurry, and I says, 'When the next car comes I am going out and drop the car and you follow me.' I ran out to run the car and told him to 'follow me' he did, and when I stepped off the car I fell by the side where by the curb, half inside the hole and half across the sidewalk." Then after he testified his wife, the "Queen" answered, "It was kind of a dark, broken area in - front was in the sidewalk, broke. Just a little piece, piece broken out all around, like a half a step, you know." The plaintiff and wife were the numerous witnesses who testified. There is evidence in the record which shows that in the passway-place near the curb, more is a 30ft wide pavement, which extends about one and one-half feet above the ground, and that in front of the pavement a stone is was used in out away, leaving a gap in the sandstone where the foot

in length.

It is urged for the City that the court erred in overruling defendant's motion, at the close of all the evidence, to direct a verdict for the defendant; and that the judgment is contrary to law, and should be reversed with a finding of facts.

In our judgment, the testimony of the plaintiff, and that of Weiss, was properly submitted to the jury. The evidence of plaintiff, that he stepped on the curb, and that he stepped into a hole and fell back and broke his leg, there being no evidence to the contrary, and, in addition to that, the corroboration which exists in the testimony of Weiss at the time he saw the plaintiff lying by the hole at the curb, and that the hole was a broken cave in the sidewalk, with pieces broken out all around, was not only maple to go to the jury, but such as would not justify us in overriding the verdict of the jury.

It is urged for the defendant, that the plaintiff failed to prove that he filed a statement in writing, of personal injuries, in the office of the city clerk and the city attorney, and failed to prove the address of the attending physician; in other words, failed to comply with Sections 7 and 8 of Chap. 70, Cahill's Rev. State.

There was introduced in evidence what purported to be a copy of the statement in writing, and it is claimed that, in order to introduce the copy in evidence, the plaintiff should have shown that he served a demand on the City to produce the original statement in writing, that is, the statement

in length.

It is urged for the City that the court erred in overruling defendant's motion, at the close of all the evidence, to direct a verdict for the defendant, and that the judgment is contrary to law, the court having no evidence and a finding of facts.

In our judgment, the testimony of the plaintiff, and that of others, was properly submitted to the jury. The evidence of plaintiff, that he stepped on the curb, and that he stepped into a hole and fell upon one knee his leg, there being no evidence to the contrary, and, in addition to that, the circumstances which exists in the testimony of Paine at the time he saw the plaintiff lying on the side of the curb, and that the hole was a broken curb in the sidewalk, with stones broken out all around, was not only sufficient to go to the jury, but even as well and justify us in overruling the verdict of the jury.

It is urged for the defendant, that the plaintiff failed to prove that he filed a statement in writing, of personal injuries, in the office of the city clerk and the city attorney, and failed to prove the delivery of the attending physicians in other cases. Failed to comply with Sections 7 and 8 of Chap. 70, Ability Ord.

There was introduced in evidence the statement to be a copy of the statement in writing, and it is claimed that, in order to indemnify the city in evidence, the plaintiff ought should have shown that he served a demand on the City to produce the original statement in writing, that is, the statement

which the plaintiff claims to have filed in the office of the city clerk and the city attorney; and that there was a failure on the part of the defendant to produce the originals upon such demand. We think the ruling of the trial judge in admitting the copy, considering what the record shows, was entirely proper.

It is urged that the plaintiff failed to prove the address of the attending physician, Eaton. The address, 6844 Crandon avenue, was recited in the notice set forth in the declaration, and was mentioned in the notice dated May 31, 1926, which was introduced in evidence. That was sufficient.

No evidence was offered by the defendant.

For the reasons stated, the judgment will be affirmed.

AFFIRMED.

HOLDOM AND WILSON, JJ. CONCUR.

165 - 32106

THE VOCATIONAL BUREAU, INC., a corp., Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
WALTER P. ORTLUND, Appellant.	

Opinion filed Feb. 9,,1928.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal from a judgment in favor of the plaintiff, The Vocational Bureau, Inc., in the Municipal Court of Chicago, entered by confession on a certain note and cognovit, on May 13, 1927, which was subsequently confirmed on July 21, 1927 after a trial on the merits.

The note in question was dated March 3, 1922, for $33.00, payable to the order of the Vocational Bureau, Inc., $15.00 on April 4, 1922, and $18.00 on April 19, 1922, with interest at six per cent per annum after maturity. It was signed by the defendant, Walter P. Ortlund, and contained a power of attorney to confess judgment.

On June 3, 1927, the judgment by confession, which had been entered on May 13, 1927, as a result of a motion and an affidavit by the defendant, was opened and the defendant given leave to appear and make a defense, the judgment meanwhile to stand as security.

At the trial, the testimony of the defendant, Walter P. Ortlund, and that of his mother, Annie Ortlund, was introduced. The evidence of the defendant is to the effect that in the early part of March, 1922, he went to the office of the plaintiff corporation for the purpose of procuring a position; that he talked with one Nelson, who was in charge of the office, and was given certain documents to sign, and that he signed them; that he was then sent out to a position, but did not accept it; that he had not paid the amount of the note in question, or any part of it. On cross-examination, he testified that he was born July 19, 1901, and attained his majority on July 19, 1922, and was at the latter date, twenty-one years of age; that he did not accept the position offered him because it was too far from his home.

The evidence of the defendant's mother, Annie Ortlund, is to the effect that the defendant was born to her at 4 a.m. on July 19, 1901, and attained his majority on July 19, 1922.

A certificate of birth of the defendant, issued by the Department of Public Health of the State of Illinois, was offered in evidence, which recites that the defendant was born on July 19, 1901.

It is contended for the defendant that the note and the warrant of attorney to confess judgment attached to the note, being signed by him on March 3, when he was under 21 years of age, ~~when he~~ was a nullity, and that the judgment entered thereon was void; citing Handley v. Wilson, 242

Ill. App. 80; Fugua v. Sholem, 60 Ill. App. 140; Lewis v. Conrad Seipp Brewing Co., 63 Ill. App. 345; Cole v. Fennoyer, 14 Ill. 158; Wieland v. Kobick, 110 Ill. 16; McCarty, et al v. Carter, 49 Ill. 53; Lewis v. VanCleve, 308 Ill. 413; Neal v. Rhydderck, 317 Ill. 231, 239.

In the Fugua case, the court said,

"The warrant of attorney to confess and the judgment were wholly void. The court was as much without jurisdiction of the person of the alleged debtor as in the ordinary case where there is no service of process."

In the Wieland case, the court said,

"The authorities seem abundantly to establish that a defendant is not estopped from setting up infancy as a defense to a contract, by his fraudulent representation that he was of full age. Merriam v. Cunningham, 11 Cush. 40; Studwell v. Shapter, 54 N. Y. 249; Gilson v. Spear, 38 Vt. 311; Burley v. Russell, 10 N. H. 184; Conrad v. Lane, 26 Minn. 389; Brown v. McCune, 5 Sandf. 224. In the latter case the court said: 'We are not aware that any case has gone the length of holding a party estopped by anything he has said or done while he was under age, and we think it would be repugnant to the principle upon which the law protects infants from civil liabilities in general.'"

The court said in the McCarty case,

"A minor who has nearly attained his majority may be able, in fact, to protect his interests in a contract as a person who has passed that period. But the law must necessarily fix some precise age at which persons shall be held sui juris. It cannot measure the individual capacity in each case as it arises. It must hold the youth who has nearly reached his majority to be no more bound by his contract than a child of tender years, and neither in one case nor the other can it permit a contractor to claim a lien against his property under the guise of a contract for improvement. This would expose minors to ruin at the hands of designing men. The mechanic who erects a building must take, like all other persons, the responsibility of ascertaining that he is contracting with a person who has reached the requisite age."

Being of the opinion that the defense of infancy at the time of the execution of the note and warrant of attorney, was made out, as a matter of fact; and that that defense was good as a matter of law, the judgment of the trial court will be reversed, and judgment entered here for the defendant.

JUDGMENT REVERSED AND JUDGMENT HERE.

HOLDOM AND WILSON, JJ. CONCUR.

195 - 32136

247 I.A. 638

FRANK J. MURNINGHAM, doing business as Frank J. Murningham & Co., Appellee, v. JOHN HENDERSON, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Feb. 9, 1928.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On January 28, 1924, Frank J. Murningham, doing business as Frank J. Murningham, the plaintiff, brought suit in the Municipal Court against John Henderson, defendant, and filed a statement of claim in which it was alleged that in the early part of July, 1923, the defendant listed certain real estate, known as 5864 Magnolia avenue, Chicago, Illinois, with him for sale; that he, the plaintiff, secured one Louis Brunner as a purchaser who was ready, willing and able to buy the property; that the defendant authorized the plaintiff to negotiate a sale of the property, with the understanding that in the event the plaintiff procured or found a purchaser, the defendant would pay him, the plaintiff, the usual and customary commission paid real estate brokers in the City of Chicago; that the plaintiff procured a purchaser and introduced him to the defendant; that as a proximate result of the efforts of the plaintiff, there was brought about a sale of the property; that the defendant, on September 22, 1923, sold the property for the sum of

$30,500.00 to Brunner, the purchaser produced by the plaintiff; that the usual and customary rate of commission in the City of Chicago paid to real estate brokers is three per cent of the purchase price, which in the present case amounted to $915.00.

On May 28, 1924, the defendant filed an affidavit of merits, in which he stated that he did not list the property with the plaintiff for sale; that the plaintiff did not secure Brunner as a purchaser ready, willing and able to buy the property; that the property was not sold to the client through the efforts of the plaintiff; that the plaintiff "in connection with plaintiff's attempted sale of said property was not acting as the broker of, and was not acting for the benefit of the defendant, but in the interest of the intending purchaser."

There was a trial before the court, without a jury, and on June 10, 1927, the court found the issues against the defendant and entered judgment for the plaintiff in the sum of $915.00. This appeal is from that judgment.

Sometime in July, 1923, in response to an advertisement by the plaintiff in the Chicago Tribune, one Louis Brunner called the plaintiff's office by telephone and inquired about the property at 5864 Magnolia avenue, which at that time was owned by the defendant, and an appointment was made for him to see the property.

One Henry W. Jansen, a salesman for the plaintiff, was the only representative of the plaintiff who dealt with the defendant in regard to the sale. He stated

that on July 30, 1923, Louis Brunner called at the plaintiff's office, looking for a six-flat building, and that he took Brunner to several buildings in Rogers Park and in North Edgewater, and among the buildings which he showed Brunner at that time was a building belonging to the defendant, being the building in question. Jansen had never met the defendant, nor had the defendant at that time requested Jensen, or the plaintiff, to sell, or offer for sale, his building. On the occasion that Jansen brought Brunner to the defendant's premises, the defendant himself was not present. Jansen had some talk with the defendant's wife, and in the evening of the same day, July 30, 1923, Jansen returned and had a talk with the above defendant and the defendant's wife, about the sale of the property. On that occasion Brunner was not present. The defendant was then willing to sell the property for $31,000. Jansen asked for an exclusive sales agreement, but the defendant refused to give him such a sales agreement, because the property was listed for sale with other brokers.

In the brief of counsel for the defendant, it is stated that Jansen asked for a forty-eight hour sales agreement, saying that if he could not sell the property in forty-eight hours he would not bother the defendant further, and that the defendant consented to give Jansen forty-eight hours to conclude the sale with his prospective customer.

As to commissions, the defendant stated that if the sale had been consummated by the plaintiff, he expected to pay a commission. Jansen said the defendant was not inclined to say very much about commissions; that he was

that on July 20, 1887, Louis Brunner mailed it to the plaintiff's attorney, leaving the a six-foot building, and that he took Brunner to several buildings in Lower Park and in North Kingsville, and among the buildings which he showed Brunner at that time was a building belonging to the defendant, being the building in question. Jensen had never met the defendant, nor had the defendant at that time recognized Jensen, or the plaintiff, in any way, or offer for sale building. He testified that Jensen brought Brunner to the defendant's premises, the defendant himself was not present. Jensen had spoke talk with the defendant's wife, and in the evening of the same day, July 20, 1887, Jensen returned to the defendant's with the above defendant and the defendant's wife, about the sale of the property. On this occasion Brunner was not present. The defendant was then willing to sell the property for $2,000. Jensen asked for an option after agreement, but the defendant refused to give him such a write agreement, because the property was liable for sale with other property.

In the brief of counsel for the defendant, it is stated that Jensen asks for a forty-eight hour option agreement, saying that if he could not meet the payment in forty-eight hours he would not bother the defendant further and that the defendant consented to give Jensen forty-eight hours to consider the sale with his prospective partner.

As to conclusions, the defendant claims that if the sale had been consummated by the plaintiff, he expected to pay a commission. Jensen sold the defendant was not

quite positive that the defendant said that if he expected to get his full commission "it would be up to me to get $31,000.00; that if I got any less than that I would probably have to make up the difference."

Several times after July 30, Jansen called Brunner in reference to the sale of the property. About a week or ten days after Brunner first saw the property, in company with the plaintiff's salesman Jansen, negotiations began to take place between the defendant, Brunner, Paul Hartung and Arthur Seeberg. The defendant testified that he had an agreement with Hartung and Seeberg whereby they promised to save him harmless as against any suit for commissions on the sale in question.

The defendant sold the premises to the Brunners for $30,500.00, and paid Hartung & Company a broker's commission of $570.00.

Sometime afterwards, the plaintiff saw a notice of the sale in the Economist, a real estate publication, and then demanded of the defendant a commission on the sale.

It is contended for the defendant that the plaintiff did not show that he was employed by the defendant. But Jansen was a salesman for the plaintiff and testified that the defendant listed the property for sale with the plaintiff, and whether he has ever met the defendant before the property was exhibited to the buyer is immaterial. The plaintiff does not claim that Jansen was

employed by the defendant to sell the property, but that the plaintiff, Jansen's employer, doing business as Frank J. Murningham & Company, was the one employed. In our judgment, the plaintiff, itself, was the procuring cause of the sale to Brunner.

As to the reasonableness of the charge for the plaintiff's services, it is not questioned in the affidavit of merits; nor does the affidavit deny that the rate of the Real Estate Board was reasonable and customary for the service rendered. Sears, Roebuck & Company v. Mears, Slayton Lumber Company, 326 Ill. App. 287.

Further, Jansen, when asked by the Court, "Anything said about commission", answered, "I think Mrs. Henderson mentioned it was regular Chicago Real Estate Commission," and that at that time both Hendersons were present.

We think the evidence amply supports and justifies the judgment of the trial judge.

The judgment, therefore, will be affirmed.

AFFIRMED.

HOLDOM AND WILSON, JJ. CONCUR.

employed by the defendant to sell the property, but that the plaintiff, Jennett, realizes, being unknown to Jones, Bennington & Company, was the sole owner. In our judgment, the plaintiff, Jennett, was the procuring cause of the sale to Jones.

As to the reasonableness of the charge for the plaintiff's services, it is not mentioned in the difficulty of proof; nor does the difficult deny that the rate of the real estate board was reasonable and customary for the service rendered. Jones, Bennett & Company v. Bates, Finding Judgment Entered, 200 Ill. App. 287.

Mr. Justice Jones, delivered the opinion of the court.

"Applying well known principles, contract is drawn by the law. Ambiguous evidence is not capable of proof and interpretation." and that at trial time both contracts were present.

We think the evidence fully supports and justifies the judgment of the trial court.

The judgment, therefore, will be affirmed.

Affirmed.

Mr. Justice Jones, dissenting.

218 - 32159

J. B. SIMPSON, Defendant in Error, v. LOUIS E. STOEBIG, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

Opinion filed Feb. 9, 1938.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is an action of the first class in the Municipal Court, begun on August 8, 1927, by the plaintiff, J. B. Simpson, against the defendant, Louis E. Stoebig, and the Collinwood Development Company (the latter of which was during the trial dismissed from the case), on a promissory note, dated October 7, 1924, in the sum of $5,000.00, payable on demand, to the order of E. L. Culver, and signed, "Collinwood Development Company, Louis E. Stoebig."

The defendant, Stoebig, filed an affidavit of merits alleging that the note was without consideration; that he believed the plaintiff paid nothing therefor, and that if anything was paid for said note, a sufficient time had elapsed between the making of the note and the transfer to put the plaintiff on inquiry; that when taking it after the lapse of so much time, the plaintiff took it subject to all the equities that might be urged in favor of the makers of the note; that the note being a demand note the plaintiff was not an innocent purchaser for value before maturity.

v. G. GLOVER,	
Defendants in Error.	
*.	
Error to Kansas.	
Plaintiff in Error,	

Opinion filed Feb. 9, 1898.

Mr. JUSTICE BROWN delivered the opinion of the court.

This is an action of the first class in the Kansas Court, under the act of March 3, 1887, to the plaintiff, A. G. Glover, against the defendant, Jacob F. Stadler, for the difference between the amount received (the latter of which was during the trial eliminated from the case), on a contract made, dated October 7, 1889, in the sum of $8,000.00, payable on demand, to the order of E. L. Glover, and signed, "Kansas Wood Development Company, Jacob F. Stadler."

The defendant, Stadler, filed an affidavit of merits alleging that the note was without consideration; that he believed the plaintiff took nothing, therein, and that if anything was paid for said note, it was without that had elapsed between the making of the note and the transfer to put the plaintiff on inquiry; that from hearing it when the lapse of so much time, the plaintiff knew it was false; to all the matters that might or ought to have come to the knowledge of the court, was not an innocent purchaser for value without notice.

There was a trial before the court, without a jury, and on June 14, 1927, judgment was entered in favor of the plaintiff and against the defendant Louis E. Stoebig, in the sum of $5600.00.

On November 30, 1927, a motion was made in this court by the plaintiff to strike the bill of exceptions, which was allowed.

The only point made by counsel for the defendant in his brief is that the note was purchased an unreasonable length of time after it was issued, and as it was payable on demand, the purchaser was not a holder in due course. The bill of exceptions having been stricken, there is now before us only the common law record; and as the question whether the note was purchased an unreasonable length of time before it was issued is one of fact, and involves evidence, we are bound, in the absence of the bill of exceptions, to assume that the evidence on that subject at the trial supported the judgment.

Inasmuch, therefore, as in our opinion, the common law record discloses no error in the trial of the case, the judgment will be affirmed.

AFFIRMED.

HOLDOM AND WILSON, JJ. CONCUR.

There was a trial before the court, without a jury, and on June 14, 1897, judgment was entered in favor of the plaintiff and against the defendant [illegible] in the sum of $2000.00.

On November 20, 1897, a motion was made in the court by the plaintiff to strike the bill of exceptions, which was filed.

The only point made by counsel for the defendant in its brief is that the [illegible] was presented an unreasonable length of time after it was issued, and in its opinion on demurrer, the [illegible] in the course. The bill of exceptions being [illegible], there is no before us only the common law record, and in the [illegible] stated its [illegible] a reasonable length of time before it was issued is one of fact, and involves evidence, as are found, in the absence of the bill of exceptions, to assume that the evidence of [illegible] as the trial proceeded [illegible].

[illegible], as it was [illegible], the [illegible] has heard [illegible] no error in the trial of the case. The judgment will be affirmed.

[illegible]

[illegible] concur, [illegible].

248 - 32189

GARDEN CITY PAINT & VARNISH CO., a corporation, in its own right and for the use of Phoenix Insurance Co. of Hartford, Conn., a corporation, and Queen Insurance Co., of America, a corporation, Appellee, v. FRANK BRESKA, doing business as Breska Motors, et al., (Defendants) On Appeal of FRANK BRESKA, INC., a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Feb. 9, 1928.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On June 20, 1925, the plaintiffs, Garden City Paint & Varnish Co., a corporation, in its own right and for the use of Phoenix Insurance Co. of Hartford, Conn., a corporation, and Queen Insurance Co. of America, a corporation, brought suit against the defendant, Frank Breska, doing business as Breska Motors, et al (the defendant's name being subsequently changed by order of the court to Frank Breska, Inc., a corporation,) to recover damages sustained by reason of certain alleged negligence on the part of the defendant, in permitting a fire to escape to and communicate with the property of the Garden City Paint and Varnish Co.

There was a trial before the court, with a jury, and on March 28, 1927, a verdict and judgment in favor of the plaintiff in the sum of $[illegible],00 and costs. This appeal is from that judgment.

Opinion filed Feb. 2, 1958.

This court, on December 23, 1927, on motion of the appellee, struck the bill of exceptions from the record; and, consequently, the only record before us is the common law record.

The only errors relied upon by the appellant, and argued in its brief, pertain to instructions, the absence of competent evidence, and the admission of incompetent evidence; but as matters that pertain to the admission of evidence and the giving of instructions, and objections thereto, do not become part of the record unless preserved by a bill of exceptions; it follows that here, in the absence of a bill of exceptions, the errors complained of, cannot be considered, and the judgment of the Municipal Court, therefore, must be affirmed. Shinn's Pldg. & Practice, Sec. 1081; The People v. Illinois Merchants Trust Co., 320 Ill. 368; Mann v. Brown, 363 Ill. 334; Gaynor v. Hibernia Savings Bank, 166 Ill. 577; Jones v. Roberts, 188 Ill. App. 609.

On the ground, therefore, that there is nothing in the record before us that discloses that an error was committed in the trial of the case, the judgment will be affirmed.

AFFIRMED.

HOLDOM AND WILSON, JJ., CONCUR.

This court, on December 8th, 1977, on motion of the appellee, dismiss the bill of exceptions from the record; and, accordingly, the only proper ruling is to the common law rule.

The only reason relied upon by the appellant, and signed in the brief, perhaps is jurisprudence, the absence of competent evidence, and the violation of law competent evidence; but is nothing pertain to the admission of evidence and the giving of instructions, and objections thereto, to not become part of the record unless preserved by a bill of exceptions; it follows that where, in the absence of a bill of exceptions, the errors complained of, cannot be ascertained, and the judgment of the municipal court, therefore, must be affirmed. Ninety Ohio, 4 Proceedings, Ohio, 1901; The Peoples v. Illinois Commerce Trust Co., 200 Ill. 200; Lane v. Lane, 200 Ill. 1941 Lane v. Illinois Central Ry. Co., 140 Ill. 477; Lane v. Lane, 140 Ill. Rep. 599.

In the result, therefore, that error is notified in the record before us, the judgment must be affirmed in the total of the case, and judgment will be affirmed.

Affirmed.

Brown and Illson, JJ., concur.

257 - 32198

U. S. TAXIMETER CORP., a corporation, Appellant,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
ACORN BATTERY CO., a corporation, Appellee.	

Opinion filed Feb. 9, 1928.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal by the defendant, U. S. Taximeter Corp., from a judgment in the sum of $124.80, in the Municipal Court, in favor of the plaintiff, Acorn Battery Co., for the price of certain automobile tires.

It is the evidence of one Roberts, an officer of the plaintiff, that on October 15, 1925, he had a telephone conversation with Kolish, branch manager of the defendant; that Kolish said that he was sending one Horowitz over for some tires and would give him an order for them; that shortly afterward, Horowitz came to the plaintiff's place of business, at 3730 Roosevelt Road, and he gave him the tires; that Horowitz had the order with him; that Horowitz did not pay for them; that payment was demanded of the defendant.

There was introduced in evidence a written order, dated, Chicago, Ill., Oct. 15, 1925, signed, "U. S. Taximeter Corporation, S. Kolish, Branch Manager,"

S. S. TANIMATOR CORP., a corporation, Appellant,	
v.	
ADCOCK MATTERY CO., a corporation, Appellee.	

Appeal from the U. S. Dist. Court, S. Dist. of Ohio.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal by the defendant, S. S. Tanimator Corp., from a judgment in the sum of $[illegible], in the Municipal Court, in favor of the plaintiff, Adcock Mattery Co., for the price of certain automobile tires.

It is evident from the evidence of one Fourth, an auditor of the plaintiff, that on October 14, 1950, he had a telephone conversation with Kolish, branch manager of the defendant; that Kolish said that he was selling one Doreville over for some time and would like to order for them; that shortly afterward, Doreville came to the plaintiff's place of business, at 2720 Monument road, and he gave him the time; that Doreville had the order with him; that Doreville did not pay for them; that payment was demanded of the defendant.

There was introduced in evidence a written [illegible], dated, Monday, [illegible] Jan. 14, 1951, signed, S. Tanimator Corporation, B. Kolish, Branch Manager,

which was as follows: "As per our conversation over the telephone, please equip Ralph Morowitz' car with the tires."

It is the evidence of Weisinger, an officer of the defendant, that Kolish was the Chicago Branch Manager of the defendant company; that he was in the office when the telephone conversation with Roberts took place; that immediately afterwards, Kolish, had the stenographer type the letter; that he heard Kolish over the telephone say that he could recommend Morowitz as an honest and reliable person to deal with, and that he would write him a letter about the matter.

It is the evidence of Kolish that he was the Chicago branch manager of the defendant; that he did not call up the plaintiff; that on October 15, 1925, he was called up by some one who said he was speaking from the office of the plaintiff; that he was asked if he knew Morowitz, and he answered, yes, and that his account with the defendant was good, and his business valued very highly; that he was then asked if he would send a letter to that effect; that he sent the document above mentioned, through the mail; that Morowitz was not in any way connected with the defendant.

No brief has been filed for the plaintiff. It is contended for the defendant that the trial judge erred in admitting the telephone conversation as testified to for the plaintiff. That is not tenable. Even the evidence for the defendant, that of its own witnesses, corroborates the fact that the conversation took place on October 15;

which was as follows: 'As you are aware, we are the defendants, I have made every inquiry and are sure the item.'

It is the evidence of Delaney, an officer of the defendant company, that he was in his office when the telephone conversation took place, and immediately afterwards, Dalton, and his stenographer saw the letter; that he heard Dalton over the telephone say that he would recommend Lowrie as an honest and reliable person to deal with, and that he would write a letter about the matter.

It is the evidence of Dalton that he was the George Brady manager of the defendant; that he did not call up the plaintiff; that on October 12, 1907, he was called up by some one who said he was speaking from the office of the plaintiff; that he was asked if he knew Lowrie, and he answered, yes, and that his account with the defendant was good, and his business valued very highly; that he was then asked if he would send a letter to that effect; that he sent the document which verbatim, Dalton the call; that Lowrie was not in any way connected with the transaction.

No proof has been filed for the plaintiff. It is contended for the defendant that the trial judge erred in admitting the telephone conversation or testified to for the plaintiff. This is not tenable. From the evidence for the defendant, that of the two witnesses, corroborates the fact that the conversation took place, on October 12;

the witnesses merely differ as to what it was. Practically the only defense the defendant seriously contends for is based on the telephone conversation; the defendant claiming that it was made up of different words from those testified to by the plaintiff's witnesses.

The defendant contends that it did not become bound to pay for the tires; that Kolish did not prove sufficient authority. But the written order of October 15, with the signature as it is, and the testimony of Weisinger, an officer of the corporation, that he was present when the conversation took place, and that Kolish immediately afterwards, in his presence, dictated a letter, and that Kolish at the time was the Chicago Branch Manager for the defendant, certainly constitutes such proof as to prevent us from overriding the judgment of the trial judge.

It is contended that the action of the defendant as claimed by the plaintiff constituted a guaranty of the debt of another, and that the defendant as a matter of law, was not liable. The written order, taken with the conversation as stated by Roberts, became, when carried out by the plaintiff by the delivery of the tires, merely an ordinary purchase and sale.

For the reasons stated, the judgment will be affirmed.

AFFIRMED.

HOLDOM AND WILSON, JJ. CONCUR.

the witnesses merely differ as to what it was. Certainly the only defense the defendant seriously urges for it is based on the Statutes governing the defendant corporation that it was made up of directors from more constituencies than the plaintiff's witnesses.

The defendant contends that it did not become bound to pay for the energy that Dalton did not pump sufficient authority. And the evidence of Dalton's dealings with the defendant on it is, and the testimony of witnesses on behalf of the corporation, that he was present with the construction and that the plaintiff undertaking afterwards, in the presence, dictated a letter, and that Kidd at the time was the Managing Director for the defendant, notwithstanding such proof as to contract be free overriding the judgment of the trial Judge.

It is material that the evidence of the defendant as claimed by the plaintiff constituted a guarantee of the debt of another, and that the defendant as a matter of law was not liable. The written evidence, taken with the conversation as stated by Dalton, because, when carried out by the plaintiff by the delivery of the wires, merely is merchantable telephone and wire.

For the reasons stated, the judgment will be affirmed.

[illegible]

[illegible]

59 - 31995

CITY OF CHICAGO, Defendant in Error, v. JOE GLASER, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

Opinion filed Feb. 9, 1928.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This is a writ of error to the Municipal Court of Chicago, in which, in an action for debt, a fine of $100 was assessed against the defendant, Joe Glaser.

The trial was before the court without a jury. The judgment was entered after defendant made a motion for a new trial, which the court denied.

The action was brought for the violation of Section 2080 of the Ordinances of the City of Chicago, which reads:

> "Every common, ill-governed or disorderly house, room or other premises, kept for the encouragement of idleness, gaming, drinking, fornication or other misbehavior, is hereby declared to be a public nuisance, and the keeper and all persons connected with or frequenting the same, shall be fined not exceeding Two Hundred Dollars for each offense."

The complaint set forth that defendant on the 11th day of December, 1926, at the City of Chicago "was then and there a keeper of a certain common ill-governed

and disorderly house kept for the encouragement of idleness, drinking and other misbehavior, which said house was then and there located at number 315 East 35th street in the City of Chicago - in violation of Section 2960 of the Chicago Municipal Code of 1922." The jury was waived and the finding and judgment above mentioned resulted.

The defendant in his brief says, "There were four cases, all charging the same thing - keeping a disorderly house at 315 East 35th street, Chicago - two against Glaser and two against Diamond. All of the cases were tried together. The same finding and judgment in all of the cases."

We take no judicial notice of the other three cases, if such there be. Our review is confined within the four corners of the record before us, and under no circumstances would we be justified in traveling outside of the record to review a judgment which in all respects was justified as a matter of law by the evidence in the record being reviewed.

Defendant argues for reversal that there was no evidence in the record showing the year in which the violation of the ordinance occurred; that while the day of the month was proven, no year was. The offense was charged to have been committed on the 11th day of December, 1928. The action was civil and not criminal and the reasons in People v. Jackson, 178 Ill. App. 355 and in Hood v. People, 191 ibid. 33, are not applicable. The record demonstrates that a very bad state of morality was practiced on the day in question, from which there can be no doubt that it was an ill-governed and disorderly house within the meaning of the section of the ordinance, supra. It would not be edifying to preserve

in the records of the court by this opinion the conditions which obtained and were present at number 318 East 35th street. On the merits the judgment is just and the penalty imposed more lenient than the offense warranted.

William Schoemaker, Chief of Detectives of the City of Chicago, was examined as a witness for the prosecution. On cross-examination Schoemaker was asked to and did identify the warrant which was served on defendant Joe Glaser, upon which the officer made the "proper return". On this cross-examination this warrant became a part of the testimony in the case, and we find it in the record before us; and in it the return of service shows that the arrest was made by Schoemaker on the 27th day of December, 1936. The writ refers to the complaint which is found in the record in which the date of the offense is stated to be the 11th day of December, 1936. We think this is sufficient evidence of the year in which the offense was charged and proved to have been committed.

Furthermore, the question is raised here for the first time, and it comes too late. If defendant had desired to avail of any infirmity in the testimony, he should have made the complaint in the first instance before the trial court. Having failed so to do, it is now too late to raise the question for the first time here.

For the foregoing reasons the judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND WILSON, J. CONCUR.

60 - 31996

CITY OF CHICAGO, Defendant in Error,	ERROR TO MUNICIPAL COURT OF CHICAGO.
v.	
JOE GLASER, Plaintiff in Error.	

Opinion filed Feb. 9, 1928.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This is a prosecution under Section 2660 of the Municipal Code of Chicago, 1922, in which the defendant is alleged to have violated said ordinance on the 26th day of December, 1926.

Defendant was admitted to bail and a trial had on the 11th day of January, 1927, before the court and a waiver of the defendant to a trial by jury.

The court, after overruling a motion for a new trial and in arrest of judgment, entered a judgment imposing a fine upon the defendant in the sum of $100, costs of suit to be taxed. The defendant brings the record here for review asking a reversal.

William Schoemaker, Chief of Detectives of the City of Chicago, was examined as a witness for the prosecution. On cross-examination Schoemaker was asked to and did identify the warrant which was served on defendant Joe Glaser, upon which the officer made the

Opinion filed Feb. 9, 1982.

No. 80-1896 affirmed Rehnquist for Justice of the court.

This is a jurisdictional main jurisdiction of the analytical data of Illinois, 1980, in which the Supreme Court is alleged to have violated all evidence of abuse of a jurisdiction, 1981.

Defendant-appellant is full, in a trial had on the 11th day of January, 1982, before the court and a waiver of the defendant to a total of 30 days.

The court, after overruling a motion and a motion for full and in spread of judgment, raised a judgment issue / time upon the judgment in the sum of five years of suit to be tested. The Illinois Court the lower for review called a reviewed.

Affirmed Rehnquist. Part of statutory of the use of claims, was brought in a school for the property. In cross-examination defendant was asked to use the identify the witness with the witness a determined the trial, upon which the witness made the

"proper return". On cross-examination this warrant became a part of the testimony in the case, and we find it in the record before us.

The defendant appeared upon the complaint and entered into a recognizance for his appearance for trial with surety.

On cross-examination Schoemaker was asked this question:

> "Q. Now, I will show you this instrument and ask you if you have seen that before? (Handing document to witness).
> A. Yes.
> Q. This is the warrant you had to serve on one John Doe, to be pointed out, alias Joe Glaser? (Handing document to witness).
> Q. You served this and made the proper return?
> A. Yes, sir."

We think the reference to the warrant, issued in pursuance of the complaint, although the warrant is not found in the record, established the date of the offense the same as in the complaint. This coupled with the fact that no objection was made on the trial to the claim that the year of the violation of the ordinance was not proven, comes too late when made on appeal for the first time. In this condition of the record we hold that the question of the year was waived.

We cannot say from the record that there was a continuing offense, as only one offense is proven against defendant in this record, and we would not be warranted in departing from the record for the purpose of reversing an otherwise just judgment of the trial court.

"proper venue". On cross-examination it will usually become a part of the testimony in the case, and so find it in the record before us.

The testimony concerned some the complaint and entered into a recognizance (an instrument for bond) with surety.

On cross-examination Commonwealth's counsel gave this question

"Q. Now, I will show you this instrument and ask you if you have seen this before? (Handing document to witness).
A. Yes.
Q. This is the warrant you had to arrest on the 5th day, is it (handing you, also the Clerk)?
(Handing document to witness).
A. Yes, sir.
Q. Yes, sir.

We think the reference to the warrant, issued in pursuance of the complaint, although the warrant is not found in the record, substitutes the date of the offense the same as in the complaint. This, coupled with the fact that no objection was made on the trial, if the date then was too late when made on appeal for the first time. In this condition of the record we fail that the conviction of the lower ran waive.

Recognizance by Jury the second date mentioned a new timing offense, so only one offense is proven, another lesson in this record, yet no error can be corrected on a writing from the lower Ct. on grounds of rendering an erroneous jury judgment of the exist court.

The violation of the ordinance was proven with other matters, which it would serve no good purpose here to repeat. The judgment of the Municipal Court in this record, being without reversible error, is affirmed.

AFFIRMED.

TAYLOR, P.J. AND WILSON, J. CONCUR.

117 - 32058

LUDWIG W. KAEUFFL, Defendant in Error, v. JOHN F. FITZPATRICK, GUY F. CREELMAN, F. GERALD THOMAS and MUTUAL FUEL CORPORATION, a corp., Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

Opinion filed Feb. 9, 1928.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Ludwig W. Kaeuffl commenced this action on the 11th day of September, 1924, in which he named as defendants John F. Fitzpatrick, Guy F. Creelman, and F. Gerald Thomas, Trustees of the Mutual Fuel Association and Mutual Fuel Corporation. On the 17th day of December, 1925, by agreement of the parties, it was ordered "that leave be and hereby is given to amend name of defendants to 'Trustees of the Mutual Fuel Association', and file amended statement of claim herein instanter," and defendants were given 15 days within which to file an affidavit of merits. On the same day plaintiff filed his amended statement of claim, in which he claimed due him the sum of $275, from the defendants John F. Fitzpatrick, Guy F. Creelman and F. Gerald Thomas, trustees of the Mutual Fuel Association. This eliminated the defendant Mutual Fuel Corporation from the case. F. Gerald Thomas, on behalf of himself and his co-defendants John F. Fitzpatrick and Guy F. Creelman, Trustees of Mutual Fuel Association, made and filed an affidavit of meritorious defense.

Opinion filed Feb. 9, 1966.

On the 19th day of March, 1926, the trial of said cause was commenced before the court without a jury, and after partially hearing the case the court adjourned the further hearing until April 19, 1926. On the 30th day of April, 1926, the trial was resumed before the court, and after hearing the evidence, the court entered the following finding: "The court finds the issues against the defendants John F. Fitzpatrick, Guy F. Greelman and F. Gerald Thomas, Trustees of Mutual Fuel Association and Mutual Fuel Corporation, a corporation, and assesses plaintiff's damages at the sum of $375." Upon that finding on the same day the court entered a judgment for the amount thereof against John F. Fitzpatrick, Guy F. Greelman and F. Gerald Thomas, Trustees of Mutual Fuel Association and Mutual Fuel Corporation, from which judgment defendants bring the record to this court by appeal.

We will not pass upon the merits of the cause, because for procedural error the judgment must be reversed.

At the time of the trial and judgment the Mutual Fuel Corporation was not a party to the action, and therefore the court had no jurisdiction to render a judgment against it with the other defendants jointly.

For the reasons above given the judgment of the Municipal Court is erroneous in having included in it Mutual Fuel Corporation, not a party to the suit, and consequently the judgment of the Municipal Court is reversed, and the cause is remanded for a new trial.

REVERSED AND REMANDED.

TAYLOR, P.J. AND WILSON, J. CONCUR.

811 - 32152

VINCENT G. GALLAGHER, MAX SHULMAN, BERNARD SHULMAN and MEYER ABRAMS, doing business as Gallagher, Shulman, Abrams & Henry, Appellants,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
DAVID DONEEN and MRS. DAVID DONEEN, Appellees.	

Opinion filed Feb. 9, 1928.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This is an undefended appeal.

The plaintiffs are lawyers and the defendants were their clients in certain matters. On a trial before court and jury there was a verdict and judgment of $226.85, from which plaintiffs prosecute this appeal, claiming that they are entitled to a judgment for $501.85.

At the conclusion of the proofs plaintiffs moved to strike defendants' affidavit of meritorious defense from the files on the ground that the affidavit of merits averred that Mrs. Doneen did not engage plaintiffs as her attorneys, and that it appeared from her evidence to the contrary that she did engage plaintiffs. Such being the fact the motion should have been allowed. The jury returned a verdict for plaintiffs for $226.85, and plaintiff moved for a judgment non obstante veredicto for $501.85, which motion was overruled as well as motions for a new trial and in arrest of judgment. Judgement

No. 12-1112

VIRGINIA G. GALLAGHER, MRS. GERTRUDE
BERNHAM HOLLIHAN and [illegible]
doing business as [illegible],
Appellees,

v.

MATTY KOHEN and WM. DAVID KOHEN,
Appellees.

Opinion filed Feb. 9, 1938.

MR. JUSTICE WILSON delivered the opinion of the court.

This is an unabridged appeal.

The plaintiffs are lawyers and the defendants are their clients in certain actions. In a trial before court and jury there was a verdict and judgment of $[illegible], from which plaintiffs prosecute this appeal, claiming that they are entitled to a judgment for $[illegible].

As the conclusion of the people indirectly concedes to which defendant attempts to verify, [illegible] the files on the ground that the affidavit of merits appears [illegible], because the not single plaintiff's [illegible], and that it appeared from the evidence to the contrary that the did engage plaintiffs. Such being the fact the motion should have been allowed. The jury rendered a verdict for plaintiffs for $[illegible], and plaintiff moved for a judgment [illegible] [illegible] for $[illegible], which motion was overruled at will as [illegible]

was entered on the verdict rendered and this appeal prayed.

In the condition of the record it is not necessary to detail the items of services which plaintiffs rendered to defendants. The record discloses that considerable professional services were rendered by plaintiffs to defendants, and that such service was of much benefit to the defendants in several intricate matters which plaintiffs, as defendants' lawyers, succeeded in untangling.

It appears from the evidence that plaintiffs, after completing their services for defendants, in discussing the amount of fees which should be paid them, claimed that their services were worth $750; that the matter was discussed pro and con between the parties and that defendants agreed to pay an attorney's fee of $500, which plaintiffs agreed to accept, plus $1.85 cash disbursements.

While Mrs. Doneen, in her affidavit of defense swore that she did not employ the plaintiffs, yet upon the witness stand she admitted that she did employ them. The defense set up in the affidavit of defense was departed from, and the defenses there stated were neither proven, admitted nor sustained by defendants by any proof heard or offered.

As the court should have allowed the motion to strike the affidavit of defense, it should also have granted the motion of plaintiffs for an instructed verdict for $501.85, and it was error of the court to deny these motions of the plaintiffs.

For these errors the judgment of the Municipal Court is reversed, and judgment is entered here in favor of plaintiffs for the sum of $501.85.

REVERSED AND JUDGMENT HERE FOR $501.85.

TAYLOR, P.J. AND WILSON, J. CONCUR.

242 - 32183

ANNETTE MEYERS, Appellee, v. CHICAGO MUSICAL COLLEGE, a Corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Feb. 9, 1928.

MR. JUSTICE HOLDOM delivered the opinion of the court.

The Bill of Exceptions in this case has been on motion stricken from the files, leaving before us for our review only the statutory record.

We will here say a word regarding our reasons for striking from the record the Bill of Exceptions.

There is no recitiation in the judge's certificate to the bill of exceptions that it contains all the evidence heard or proffered on the trial, or that it is a correct transcript of the proceedings had before the court in the trial of the cause.

It appears by the stipulation of the attorneys "that the original bill of exceptions may be filed and used herein in lieu of a copy thereof," and to this is added "without waiving any right to object to the sufficiency of any part of said bill of exceptions."

It is contended that the stipulation that the

original bill of exceptions should be made a part of the record instead of a copy cures any informality in the judge's certificate, and in support of that contention Lederbrand v. Pickrell, et al, 167 Ill. 634, is cited as a supporting authority.

This point would be well taken but for the added clause above recited, that the stipulation is "without waiving any right to object to the sufficiency of any part of said bill of exceptions." This part of the stipulation in legal effect negatives any presumed waiver of informality in the judge's certificate arising from the fact that by stipulation it was agreed that the original bill of exceptions should be filed and made a part of the record in lieu of a copy of the same.

Plaintiff reserved all her rights to raise and make objections to any informality there might be in the judge's certificate or otherwise in the bill of exceptions.

This case on this point is analogous to Hershowitz v. The Royal Tailors, 152 Ill. App. 10 and L. Haselgren & Co. v. Esser, ibid. 7.

There is no error assigned on the statutory record, and as that only is before us for review at the present time, the judgment of the Municipal court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND WILSON, J. CONCUR.

original bill of exceptions should be made a part of the record instead of a very meager abstracts in the judge's certificate, and in support of that contention Lechmunnd v. Pickerell, 17 Ill. App. 121, 124, cited as a supporting authority.

This point would be well taken but for the added clause above quoted, that the allocution is "without waiving any right to object to the sufficiency of any part of said bill of exceptions." This part of the stipulation is legal effect exclusive of preserved objections in the judge's certificate arising from the fact that by stipulation it was agreed that the original bill of exceptions should be filed and made a part of the record in lieu of a copy of the same.

Plaintiff therefore will not be heard to raise and make objections to any informality there might be in the judge's certificate or otherwise in the bill of exceptions.

This case on this point is controlled by Chicago v. The Rock Island, 160 Ill. App. 31 and Chicago & N. W. v. Ebert, 1848, 7.

There is no error assigned on the substantive record, and we find only in helpful in the review of the present time, the judgment of the municipal court is affirmed.

AFFIRMED.

TAYLOR, P.J., and CLARK, J., concur.

34 - 31956

FRED SCHUEMANN, Defendant in Error, v. BEN A. LOEB, Plaintiff in Error.	ERROR TO SUPERIOR COURT, COOK COUNTY.

Opinion filed Feb. 9, 1928.

MR. JUSTICE WILSON delivered the opinion of the court.

The facts in this case show that defendant in error, Fred Schuemann, recovered a judgment on February 11, 1915, against plaintiff in error, Ben A. Loeb, in the Municipal Court of Chicago, for $123.82. This writ of error is sued out on a judgment in the Superior Court of Cook County, based on said judgment in the Municipal Court. A number of pleas were filed and demurrers were sustained to certain pleas, and certain replications were filed after hearing on said demurrers. An appeal was prayed and allowed from the Superior Court to the Supreme Court of this State, but was never perfected. Judgment was entered January 10, 1925, and on January 10, 1927, a writ of error was sued out in the Supreme Court and the cause was remanded by that court to the Appellate Court, on the ground that there was no constitutional question involved, as was claimed by plaintiff in error in that court. The judgment of the Superior Court was for $193.15, and it is insisted here that the cause should be reversed because of the following errors

committed by the trial court. (1) That the judgment could not be entered because the judgment order of the Municipal Court was not a proper judgment order. (2) That the trial court erred in refusing to find certain facts submitted to the court, the trial being to the court without a jury. (3) That the judgment entered in the Municipal Court February 11, 1913, was merged in a subsequent judgment based on said judgment, in a justice court in Oak Park, Cook County, Illinois. As to the first of these claims, the particular ground of objection appears to have been based on the constitutionality of the manner of keeping the records of the Municipal Court, and this question was decided adversely to plaintiff in error by the remanding of this cause to this court by the Supreme Court. Moreover, this court is of the opinion that the judgment order appearing in evidence on the trial of the cause, was sufficient upon which to base the judgment of the Superior Court. On the question as to whether or not the court erred in refusing to enter a finding as to certain facts, it appears from the record that the findings were submitted to the trial court after the cause had been fully heard and had been taken under advisement by that court. This court in the case of Bradley v. Federal Life Ins. Co., 178 Ill. App. 534, in its opinion at page 535, says:

> "It is next urged that the court erred in refusing to make certain special findings of fact submitted by defendant's counsel. The certificate of the trial judge in the bill of exceptions shows that these special findings were not submitted until after the case had been taken under advisement, and for this reason, the court declined to mark them either 'held' or 'refused'. There was no error in the refusal of the court to consider them, under such circumstances. Hurd's Rev. Stat. Ill. chap. 110, sec. 61."

We find that the court properly refused to make the findings submitted under the circumstances shown by the record in this case. As to the third and last contention of plaintiff in error; that the judgment of the Municipal Court was merged in a subsequent proceeding in a justice court in Oak Park, it appears that two certain pleas were filed by plaintiff in error, setting forth these facts, to which demurrers were filed, and these were undisposed of at the time of the hearing. There is no testimony on this question appearing in the abstract and this court will not search the record for it. The only ground for reversal seems to be that the court had proceeded to enter a judgment without disposing of these pleas, and demurrers pending thereto. The rule is, however, that where parties to a suit at law go to trial as though the case were at issue, an objection cannot be raised for the first time in a court of review. Devine, Admr. v. The Chicago City Railway Co., 227 Ill. 278.

There is a serious question as to whether or not the writ of error in this case was sued out within the statutory period for the suing out of writs of error, but we have considered it unnecessary to pass on this question. The judgment was for $132.82. It was entered in 1913. After the judgment in the Superior Court, two years elapsed before the writ of error was sued out, and the appeal allowed by the trial court was never perfected. There comes a time when litigation should be ended. This court finds no reversible error in the record, which is material in its character.

For the reasons stated in this opinion the judgment of the trial court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

43 - 31974

MAURICE TAUSSIG and EUGENE W. F. FLESCH, co-partners, trading as TAUSSIG & FLESCH, Appellees,	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
v.	
JACOB HANDELSMAN, Appellant.	

Opinion filed Feb. 9, 1928.

MR. JUSTICE WILSON delivered the opinion of the court.

The declaration in this cause alleges that the defendant Handelsman on April 15, A. D. 1926, executed his certain written guaranty, wherein said defendant guaranteed payment to plaintiffs, Taussig and Flesch, a co-partnership, of all money due or to become due to plaintiff from L. M. Marks, Inc., on account of professional services to be rendered said L. M. Marks, Inc., in the preparation of plans and specifications, etc., of store fixtures for said L. M. Marks, Inc. The undertaking of the defendant guaranteed payment in the sum of not to exceed $2,000, and further that said L. M. Marks, Inc., by its written agreement, retained the plaintiff to prepare plans and specifications, etc., store fixtures; and that in pursuance of said written agreement, it rendered and prepared plans, etc., and rendered other professional services for said L. M. Marks, Inc., to the reasonable value of $2,000; that the said L. M. Marks, Inc., and L. M. Marks, being indebted to the

plaintiff, promised to pay but have not done so, though often requested so to do; that by reason of the nonpayment of the said sum due to them, the defendant, by reason of his undertaking, now has become indebted to the plaintiff in the sum of $3,000. Attached to the declaration was an affidavit of claim; and the written guaranty was also attached thereto as Exhibit A. There was also attached to the declaration, as Exhibit B., a written contract between L. N. Marks, Inc., and Taussig & Flesch. To this declaration a plea of the general issue was filed and an affidavit of defense, which affidavit admits the execution of the written guaranty and admits the written contract between L. N. Marks, Inc. and plaintiff below, but denies that the plaintiff carried out its contract, and charges that it became necessary for L. N. Marks, Inc., to enter into negotiations with others for plans and specifications; also charges that the defendant below is not indebted by reason of the failure of the plaintiff below to carry out its contract.

There is no bill of exceptions preserved in the record, and the only question for consideration is whether or not the declaration alleges and states a cause of action. It is argued that it is improper to attach exhibits to a common law declaration and, therefore, they should not be considered as part of the declaration, but the record discloses no demurrer to the declaration in the first instance nor a motion to strike the exhibits, but instead, the record shows an affidavit of defense, admitting the fact that the guaranty was entered into by the defendant below as shown by exhibit "A" and that the contract by and between L.N. Marks,

plaintiff, promised to pay but have not done so, though often requested so to do; that by reason of the nonpayment of the said sum due to them, the defendant, by reason of his undertaking, now has become indebted to the plaintiff in the sum of $3,000. Attached to the declaration was an affidavit of claim; and the written guaranty was also attached thereto as Exhibit A. There was also attached to the declaration, as Exhibit B., a written contract between L. A. Durin, Inc., and Thornely & Fitch. To this declaration a plea of the general issue was filed and an affidavit of defense, which affidavit admits the execution of the written guaranty and admits the written contract between L. A. Durin, Inc., and plaintiff below, but denies that the plaintiff carried out its contract, and charges that it became necessary for L. A. Durin, Inc., to enter into negotiations with others for plans and specifications; also charges that the defendant below is not indebted by reason of the failure of the plaintiff below to carry out its contract.

There is no bill of exceptions preserved in the record, and the only question for consideration is whether or not the declaration alleges and states a cause of action. It is argued that it is improper to attach exhibits to a common law declaration and, therefore, they should not be considered as part of the declaration, but the record discloses no demurrer to the declaration in the first instance nor a motion to strike the exhibits and instead, the record shows an affidavit of defense, admitting the fact that the guaranty was entered into by the defendant below as shown by exhibit "A" and that the contract was entered by and between L. A. Durin,

Inc., and plaintiff below, was duly entered into as shown by Exhibit B.

A trial resulted in a verdict by a jury, finding the defendant guilty and assessing plaintiff's damages at the sum of $750.00. Judgment was entered on the verdict. Every intendment in favor of the declaration should be indulged in after verdict; and from an examination of the declaration, under the circumstances, this court finds that, in its opinion, the declaration states facts sufficient to sustain the verdict, particularly in view of the affidavit of defense filed in said cause.

For the reasons stated in this opinion, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

61 - 31937

CITY OF CHICAGO, Defendant in Error,	ERROR TO MUNICIPAL COURT OF CHICAGO.
v.	
WILLIAM DIAMOND, Plaintiff in Error.	

Opinion filed Feb. 9, 1928.

MR. JUSTICE WILSON delivered the opinion of the court.

This is an action of debt to recover a penalty for the alleged violation of Section 2020 of the Municipal Code 1922.

The complaint alleged that the defendant on the 11th day of December, 1926, at the City of Chicago, was then and there a keeper of a certain common, ill-governed and disorderly house, kept for the encouragement of idleness, drinking and other misbehavior, which house was then and there located at number 315 East 35th Street, Chicago. Defendant waived a jury, and the cause was tried by the court, in which the following finding was entered:

> "The Court finds the defendant guilty of a violation of the ordinance described in the complaint herein and assesses a fine against said defendant in the sum of One Hundred dollars."

The merits of the case are not in dispute, but in errors duly assigned defendant asks for a reversal of the judgment on the grounds, first, that the City failed to prove the year in which the violation complained of occurred, and

secondly, that it was error for the court to impose two fines.

We will decide these points in the inverse order in which they are above stated.

Our review is confined to the record before us, and in it we find but one fine, namely, the one involved in this appeal as above set out. The law does not permit this court to consider the record in another case for the purpose of reversing a just judgment before us for review. The fine appealed from was of $100.

William Schoemaker, Chief of Detectives, was sworn as a witness, and on cross-examination by defendant's counsel was asked the following questions and made the positive answers as follows:

> "Q. Now, Chief, when you went in you had a warrant for the arrest of Joe Glaser? A. Yes.
> Q. And for Diamond? A. Yes, sir.
> Q. I will show you this instrument and ask you if that is not the warrant you had for the arrest of one John Doe, to be pointed out, alias William Diamond? A. Yes.
> Q. Is this the warrant that you served? (Handing document to witness). A. Yes.
> Q. Referring to warrant in case 2231088, Defendant's Exhibit No. 1, for the arrest of John Doe, to be pointed out, alias William Diamond, you served this warrant, did you not?
> A. Yes, sir.
> Q. And you did arrest Diamond. A. Yes, sir and made the return. * * *
> Q. I will show you this instrument and ask you if you have seen that before? (Handing document to witness).
> A. Yes."

The warrant referred to is found in the record and the return of Schoemaker shows as follows: "Executed this writ by arresting the within named John Doe, alias William Diamond, and bringing his body into Court, this 27th

necessity, that it was proper for the [illegible] to [illegible] the [illegible]

We will decide these matters on the [illegible] upon
in which they are [illegible].

Our review is confined to the [illegible] decision,
and in it we find no error. Usually, the [illegible]
in this regard as [illegible]. The law [illegible] and [illegible]
this court to consider [illegible] should be [illegible] the
purpose of reversing a [illegible] judgment [illegible] on the ground
the [illegible] from use of [illegible].

Fellow Defendants. Chief of [illegible], [illegible] [illegible]
as a witness, and on cross-examination by [illegible], counsel
[illegible] the following [illegible] [illegible] [illegible] [illegible]
as follows:

"Q. Now, Chief, when you [illegible] in [illegible] [illegible]
warrant for the arrest of Joe [illegible]? A. Yes.
Q. And [illegible]? A. Yes, sir.
A. I will [illegible] Joe [illegible] and [illegible]
you if that is [illegible] warrant you had for him [illegible]
of one [illegible], [illegible] [illegible] [illegible]
[illegible]? A. Yes.
Q. Is this the warrant that [illegible] [illegible]
document to [illegible]? A. Yes.
Q. Referring to [illegible] in [illegible], [illegible]
[illegible]'s [illegible]? A. Yes. [illegible] [illegible] [illegible]
be [illegible], [illegible] [illegible], [illegible] [illegible]
[illegible], [illegible] [illegible]?
A. Yes, sir.
Q. And you [illegible] [illegible]? A. Yes, sir
and [illegible] the [illegible].
Q. I will [illegible] [illegible] [illegible] and [illegible]
if you have [illegible] [illegible] [illegible] [illegible]
[illegible]?
A. Yes."

The [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
and the [illegible] of [illegible] [illegible] [illegible] [illegible]
this [illegible] by [illegible] the [illegible] [illegible] [illegible], [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

day of December, A. D. 1926."

The violation of the ordinance is charged in the complaint as having occurred on the 11th day of December, 1926. We think the foregoing substantially establishes the year in which the violation of the ordinance occurred. Furthermore the point was not raised in the trial court, and is made here for the first time. The objection comes too late. If defendant desired to avail of that point, he should have first raised it in the trial court.

Finding no reversible error in the record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

62 - 31998

CITY OF CHICAGO, Defendant in Error, v. WILLIAM DIAMOND, Plaintiff in Error,	ERROR TO MUNICIPAL COURT OF CHICAGO.

Opinion filed Feb. 9, 1928.

MR. JUSTICE WILSON delivered the opinion of the court.

This is a civil action, one in debt, to recover a penalty for the violation of Section 7660 of the Municipal Ordinances of the City of Chicago 1922. In the complaint the violation of the ordinance is alleged to have taken place on the 26th day of December, 1926. The situs of the ill-governed and disorderly house was laid at 315 east 35th street, Chicago.

Defendant waived a jury, and the cause was tried before the court, who after hearing the evidence found against the defendant and the finding and judgment of the court reads as follows:

> "The Court finds the defendant guilty of a violation of the ordinance described in the complaint herein and assesses a fine against said defendant in the sum of one hundred dollars."

Defendant moved for a new trial, which the court denied and entered judgment upon the finding against defendant for $100 and costs of suit.

Defendant does not dispute in any way the finding upon the merits of the cause, but raises two questions, first, that there is no evidence in the record showing in what year the alleged violation occurred; and second, that the keeping of a disorderly house was a continuous offense, and that only one penalty could be recovered, and that two have been assessed against defendant.

As to the second point, suffice it to say that this court reviews the record brought here by defendant for review, and that record shows that one penalty only was recovered, and that there is nothing in the record before us regarding any other penalty. It is not the province nor the duty of the court to examine other records before it for the purpose of reversing a meritorious judgment.

As to the first point regarding proof of the year of the violation of the ordinance.

It is the province of a writ of error to search the whole record, and before we can determine the correctness of the court's finding, we must necessarily look to the complaint, because in the finding the court finds the defendant guilty of the violation of the ordinance "described in the complaint herein", and when we look at the complaint we find that the offense was committed on the 25th day of December, 1926.

Furthermore, William Schoemaker, chief of detectives of the City of Chicago, was called as a witness, and was cross-examined by counsel for defendant, in which the following questions were asked and answers given:

"Q. Now, Chief, when you went in you had a warrant for the arrest of Joe Glaser? A. Yes.

Q. And for Diamond? A. Yes, sir.

Q. I will show you this instrument and ask you if that is not the warrant you had for the arrest of one John Doe, to be pointed out, alias William Diamond? A. Yes.

Q. Is this the warrant that you served? (Handing document to witness.) A. Yes.

Q. Referring to warrant in case 2231068, Defendant's Exhibit No. 1, for the arrest of John Doe, to be pointed out, alias William Diamond, you served this warrant, did you not. A. Yes, sir.

Q. And did you arrest Diamond? A. Yes sir, and made the return."

This warrant is not found in the record, but we think defendant's bringing the same out on cross-examination in Schoemaker's testimony, established the date of the offense to be the same as the complaint. Then again, no objection was made on the trial to the claim that the year of the violation of the ordinance was not proven. It comes too late when made on appeal for the first time. This being a civil action, objections not made in the trial court are unavailing when made on review for the first time. The whole record considered, the date of the offense, including the year, stands sufficiently proved thereby.

There is no error in this record which would justify a reversal of the judgment of the municipal court, and it is therefore affirmed.

AFFIRMED.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

"Q. Now, Sir, when you were in jail had a warrant for the arrest of one Hanson? A. Yes.

Q. And for Hammond? A. Yes, sir.

Q. I will show you this instrument and ask you if that is not the warrant you had for the arrest of one John Doe, to be defined as, sitting William Hammond? A. Yes.

Q. Is this the warrant that you showed Judging Commons to release? A. Yes.

Q. Indeed! Do others to make Sitting, Certainly! Yes! A. For the arrest of John Doe, is in regular use, sitting Sitting, you served this warrant, did you not, A. Yes, sir.

Q. And did you return it? A. Yes sir, and made the return."

This matter is not issue in the present, but we think defendant's imagine the same is a cross-examination in Commonwealth's testimony, establishes the date of the offense to be the same as the complaint. Upon again, no objection was made on our part, so the date of the year of the visiting of the commission was not answer. It seems too late then now on appeal for the first time. This being a civil action, objections not made in the trial court are unavailing when made on appeal for the first time. The civil rights considered, in view of the offense involving the year, stands sufficiently proved thereby.

There is no error in the record that will justify a reversal of the judgment of the municipal court, and it is affirmed with costs.

[illegible]

[illegible] J.A. [illegible], J. [illegible]

80 - 32018

FELIX KOTAS, Administrator of the Estate of BERTHA TOPOL, Deceased, Defendant in Error,	)	ERROR TO SUPERIOR COURT, COOK COUNTY.
v.	)	
REGINA BARON and PAUL BARON, Plaintiffs in Error.	)	

Opinion filed Feb. 9, 1928.

MR. JUSTICE WILSON delivered the opinion of the court.

This cause comes before this court on a writ of error to the Superior Court of Cook County, to reverse a judgment entered in said court, for the plaintiff in the sum of $2,287.05, on February 8, 1927. There is no bill of exceptions in said cause and this court has before it only the common law record. From the declaration filed in said case it appears to have been an action in trover against the defendant below to recover the value of a certain note for $2,000. It is insisted by plaintiff in error that trover will not lie in such an action. This court in the case of Bentley, Murray & Company v. LaSalle Street Trust & Savings Bank, 197 Ill. App. 324, in its opinion at page 324, says:

> "Trover may be maintained for notes and bills, and the measure of damages is prima facie, the amount of their face."

The testimony is not preserved by bill of exceptions. This court has nothing before it except the common law record. Every intendment in favor of the judgment should

No. 5[illegible]

FELIX KOTAS, Administrator of the
Estate of SERGEI TOTAS, Deceased,

Defendant in error,

vs.

ROBERT MOWER and PEARL MOWER,

Plaintiffs in error.

Error to
[illegible]
Cass County.

Opinion filed Feb. 9, 1920.

MR. JUSTICE [illegible] delivered the opinion of the court.

This cause comes before this court on a writ of error to the probate court of Cass County, to review a judgment entered in said court, for the plaintiff in the sum of $4,[illegible], on February 5, 1917. There is no bill of exceptions in said cause and this court has before it only the common law record. From the declaration filed in said case it appears to have been an action in trover against the defendants to recover the value of a [illegible] cow for $[illegible]. It is instituted by plaintiff in error that trover will not lie in such an action. This court in the case of [illegible], [illegible] v. [illegible] Street Tract & Terminal Co., 187 Ill. App. 287, in its opinion at page 324, says:

> "Trover may be maintained for money had and paid, and the measure of damages is prima facie, the amount of that fund."

The testimony in such proceeding by bill of exceptions. This court has nothing before it except the common law record. Every intendment in favor of the judgment should

be indulged in.

For the reasons stated in this opinion, the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

89 - 32029

WILLIAM LOEHDE and WILLIAM H. LOEHDE, a copartnership, doing business as William Loehde, Appellees, v. ANNA STRAUSS, Appellant.	APPEAL FROM COUNTY COURT, COOK COUNTY.

Opinion filed Feb. 9, 1928.

MR. JUSTICE WILSON delivered the opinion of the court.

This is a suit to recover a real estate commission. A trial by jury was waived and the cause was submitted to the court. The court found the issues for the plaintiffs below and assessed their damages at the sum of $875.00; and judgment was entered on the finding. It appears that this cause had been tried before and a judgment rendered, from which an appeal is perfected to this court, and the judgment was reversed and the cause remanded on the ground that the cause should have been brought by the co-partnership instead of by William Loehde. Loehde v. Strauss, 230 Ill. App. 655. The judgment in that case was for $750. The record in the case now before us shows that the declaration was amended in conformity with the opinion of this court.

It appears that the co-partnership consisted of William Loehde, the father, and William H. Loehde, the son, and that William Loehde was a duly licensed real estate broker, by virtue of a license issued to him at 348 Wrightwood avenue, Chicago. It is argued that the contract involved

No. 5222

WILLIAM LOBDEN and WILLIAM H. LOBDEN, a copartnership, doing business as William Lobden,

Appellants,

vs.

ANNA STRAUSS,

Appellee.

Opinion filed Feb. 9, 1928.

Appeal from the court.

This is a suit to recover a real estate commission. A trial by jury was waived and the cause was submitted to the court. The court found the issues for the plaintiff below and assessed their damages at the sum of $[illegible], and judgment was entered on the finding. It appears that this cause had been tried before, on a previous trial, the which on appeal is reviewed in this court, and the judgment was reversed and the cause remanded on the ground that the cause should have been brought by the copartnership doing of by William Lobden. Lobden v. Strauss, [illegible] Ill. App. The judgment in that case was for $[illegible]. It proved in the case now before us that the plaintiffs were counsel in controversy with the owning of this court.

It appears that the copartnership consisted of William Lobden, the father, and William H. Lobden, the son, and that William Lobden was a duly licensed real estate broker, by virtue of a license issued to him of the Illinois real estate. Statute. It is claimed that the original involved

[illegible]

in the real estate deal in controversy recites that the deal was to have been closed at the office of William Loehde, 2517 Lincoln avenue, Chicago. It is contended that the license aforesaid does not cover the place of business named in the contract. We can see no material objection to the verdict on this ground. Nor can we see any material objection to the right of the partnership to recover in this case, because of the fact that the broker's commission ran to William Loehde instead of the co-partnership. From the testimony it appears that the contract was with William Loehde, a duly authorized broker. The fact that his son and co-partner participated in the work done in connection with the procuring of the contract of sale, was not sufficient to defeat the right of plaintiff below, appellee here, to bring this suit. Two trial courts have passed on the questions of fact and found for the plaintiff below.

We find no material error in the record and for the reasons announced in this opinion, the judgment of the County Court will be affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

In the real estate deal in controversy exists that the deal may be done in view of the action of utility company, Gulf Lakeside Power, Inc. It is asserted that the license aforesaid does not cover the plan of business named in the contract. To one not a medical physician or the vendee on this question. Our job as our medical objection to the right of the purchaser to recover in this case, because of the fact that the lessee's employing one to utilize lawful instead of the non-practitioner. Upon the testimony in evidence that the relation the plaintiff lessee, a duly authorized lessee. The fact that the non medical-practitioner participated in the work from in connection with the preparing of the contract of sale, not sufficient to defeat the right of plaintiff lessee, specific lessee, to bring this suit. The trial court erred in the question of fact and found for the plaintiff below.

We find no material error in the record and for the reasons assigned in this opinion, the judgment of the county court will be affirmed.

FILED: T.J.: ARE EQUAL, J. CONCUR.

101 - 38041

SAMUEL BROWN, Appellee, v. JACOB ASHKENAZY, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Feb. 9, 1928.

MR. JUSTICE WILSON delivered the opinion of the court.

The facts in this case show that the appellee, Samuel Brown, hereinafter called the plaintiff, brought this action against the appellant, Jacob Ashkenazy, hereinafter called defendant, in the Municipal Court of Chicago, on a certain lease, for rent for the months of April and May, 1926. Judgment was entered by confession for the sum of $135.00 as rent and $25.00 additional as attorney's fees. Defendant filed a certain petition to vacate said judgment, and alleged in the petition that he had been a tenant of the plaintiff and had paid his rent up to and including March 31, 1926, and that on April 7, 1926, the petitioner was ordered and directed to vacate the apartment he occupied, by the Superior Court of Cook County; that on April 26, plaintiff had obtained a judgment for possession in forcible entry and detainer against the defendant in case No. 1557431, and has had possession of the said apartment subsequent to April 7, 1926. Petitioner further avers that he has not beenin possession of theapartment since April 7, 1926, and if he owes anything at all, it is for the seven days rent

from March 31 of that year; that plaintiff had once before confessed judgment on the lease for the same period; and said judgment was set aside by one of the judges of the Municipal Court, and when the case was reached for trial in its regular course, plaintiff failing to appear, the cause was dismissed; and that thereafter plaintiff moved to have the court vacate said order, dismissing said cause, but the court refused so to do. The record further discloses, as shown by the additional abstract of record filed herein, that the lease contained a clause covering the right of the lessor to collect rent, despite a five-day notice and the institution of any forcible detainer or ejectment proceedings. The clause reads as follows:

> "The obligation of Lessee to pay the rent reserved hereby during the balance of the term hereof, or during any extension hereof, shall not be deemed to be waived, released or terminated, nor shall the right and power to confess judgment given in Clause fifteenth hereof be deemed to be waived or terminated, by the service of any five-day notice, of a notice to collect, demand for possession, or notice that the tenancy hereby created will be terminated on the date therein named, the institution of any action of forcible detainer or ejectment or any judgment for possession that may be rendered in such action, or any other act or acts resulting in the termination of Lessees' right to possession of the demised premises. The Lessor may collect and receive any rent due from Lessee, and payment or receipt thereof shall not waive or affect any such notice, demand, suit or judgment, or in any manner whatsoever waive, effect, change, modify or alter any rights, or remedies which lessor may have by virtue hereof."

Petitioner further refers to case No. 1557431 in his petition and makes it a part thereof. A reference to this record shows that judgment for possession was entered on April 26, 1930. In the additional record filed by plaintiff it appears that a writ of restitution issued May 28, 1938,

and was satisfied as to possession August 27, 1926.

It is argued by counsel for defendant that the action of the trial court in refusing to vacate a motion to dismiss the first proceeding, was a final judgment. With this we cannot agree. There was no hearing on the merits of the cause. The suit was dismissed for want of prosecution. The motion to vacate the order dismissing the suit for want of prosecution, did not alter the status of the case. It was still an involuntary non-suit and the plaintiff had the right to recommence his cause of action within the statutory limitation. We find nothing in the petition which would justify the court in setting aside the second judgment. The ground principally relied upon in said petition appears to be that by reason of some order entered by the Superior Court, the defendant was ousted from possession, but there is no reference to the title of the action; any copy of any order; nor any number of said cause, and it appears that the plaintiff was not a party to said proceeding, and the allegation in said petition was a mere legal conclusion of the pleader. The clause in the lease referred to explicitly waives the right of the tenant to cancellation of the rent by reason of the forcible entry and detainer proceeding, and obligates him to pay the rent to the end of the term. This rule was applied in the case of Melick v. Central Investment Co., 180 Ill. App. 24, where the court in its opinion at page 28 says:

"As to the effect of the proceedings in the former case upon the lease itself, clause 3 of the lease, quoted in the statement preceding this opinion, provides that the lessor should have the

right, in case of default by the lessee in the payment of rent, to re-enter and take full and absolute possession of the premises without such re-entry working a forfeiture of rents to be paid and the covenants to be performed by the lessee during the full term of the lease. Under this express provision of the lease, the Central Investment Company was authorized, in case of default, to re-enter and take possession of the premises, either by forcible detainer proceedings or otherwise, without the same working a forfeiture of the lease. Grommes v. St. Paul Trust Co., 147 Ill. 634. The lease in the Grommes case contained a similar clause to the special clause in this lease. In that case default was made in the payment of rent and suit was commenced for possession of the premises. The Supreme Court, after reviewing cases bearing on the cases quite fully, on page 643 of the opinion says:

'There is nothing illegal or improper in an agreement, that the obligation of the tenant to pay all the rent to the end of the term shall remain notwithstanding there has been a re-entry for default; and, if the parties choose to make such an agreement, we see no reason why it should not be held to be valid as against both the tenant and his sureties.'"

Under this clause of the lease, plaintiff had a right to maintain an action regardless of the institution of forcible entry and detainer proceedings and possession recovered thereunder. Moreover, plaintiff did not get possession until August 27, 1926, and the defendant was liable for use and occupation.

For the reasons expressed in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

110 - 32050

AMERICAN GLASS CO., a corporation, for the use of GLEN FALLS INSURANCE CO., a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
ALBERT L. FELL, Appellee.	

Opinion filed Feb. 9, 1928.

MR. JUSTICE WILSON delivered the opinion of the court.

The facts in this case show that the American Glass Co., appellant here and plaintiff below, by its servant and agent was driving a certain motor truck loaded with glass, in an easterly direction on North Avenue between 57th and 58th street, in the City of Chicago, on the morning of June 18, 1925, about ten o'clock. The truck was proceeding at about 15 to 18 miles an hour. Directly in front of it, and proceeding in the same direction, was another large motor truck, owned by appellee, defendant below, which was running at about the same rate of speed.

The testimony shows that the driver of defendant's truck came to a sudden stop in order to talk to someone on the sidewalk. From the testimony on behalf of the plaintiff it appears that the truck being driven by its servant, was 25 to 35 feet behind the truck of the defendant, and that no signal appears to have been given by the driver of defendant's truck before it came to a stop. The witness Eisenchaniel, sitting on the front seat with the driver of plaintiff's

Dublin Hilt.Tel. 8, 1922.

the world.

The Irish in Erie were more than the American Sinn Fe., sympathizers here and physically below, in the service and keep his living a matter-of-fact that lately with glum, in an easterly direction on dark avenue between 27th and 28th street, in the city of Chicago, on the morning of July 24, 1921, about ten o'clock. The train was proceeding at about 15 to 18 miles an hour. Directly in front of it, and proceeding in the same direction, was another large motor truck, owned by Lyndale, Minnesota below, which was running at nearly the same rate of speed.

Mr. Robinson knew that the driver of Lyndale's truck was in a sudden way in order to talk to someone on the sidewalk. From the testimony on behalf of the plaintiff it appears that the truck being driven by his servant, was 12 to 20 feet behind the truck of the defendant, and that no signal appears to have been given by his driver of Lyndale's truck before it came to a stop. The minors discovered, sitting on the front seat with Mr. Brown of plaintiff's

truck, testified that he saw no signal, and in the absence of proof to the contrary, it would not be an unreasonable inference that none was given. According to the testimony, the driver of the plaintiff's truck put on his brakes but was unable to prevent it from running into the truck belonging to defendant. As a result of the collision, it appears that certain glass being conveyed by plaintiff's truck was broken, and this action was for property damage. At the end of the testimony, defendant made a motion to direct a verdict, and the trial court, pursuant to said motion, directed the jury to find the issues in favor of the defendant. A motion for a new trial was overruled. A motion in arrest was also overruled and judgment was entered on the finding; and an appeal prayed and allowed to this court. We are not aided in the decision of this case by any brief on behalf of the defendant.

It is insisted by plaintiff that the trial court erred in directing a verdict; that the question of negligence on the part of the defendant, and due care on the part of the plaintiff, should have been left to the jury as a question of fact for their consideration. The question of contributory negligence is ordinarily one of fact for the jury, and only becomes one of law where the undisputed evidence establishes that the accident resulted from the negligence of the injured party. If there be a difference of opinion on the question, so that reasonable minds may arrive at different conclusions, then it is a question of fact for the jury. Chicago City Railway Co. v. Nelson, 215 Ill. 438; Chicago and Joliet Ry. Co. v. Wanic, 230 Ill. 530. The Supreme Court in the case of Shannon v. Nightingale, 321 Ill. 168, at page 175 in its opinion, says:

"An instruction taking the case from the jury should be given only where the evidence, with all the legitimate and natural inferences to be drawn from it, is wholly insufficient, if credited, to sustain a verdict for the plaintiff. It is immaterial upon which side the evidence is introduced. If there is evidence which fairly tends to support the plaintiff's case, it must be submitted to the jury, (Purdy v. Hall, 134 Ill. 398; Pullman Palace Car Co. v. Lasek, 142 id. 242; Lake Shore and Michigan Southern Ry. Co. v. Richards, 152 id. 59;) and no question of its sufficiency to support the verdict can be raised in this court. It is a question of law whether there is any evidence tending to prove the allegations of the plaintiff's declaration, and it is a question of fact, where there is such evidence, whether it is sufficient to sustain such allegations. The former is a question for the court; the latter a question for the jury, subject to revision by the court on motion for a new trial. Therefore the court may not properly take the case from the jury and direct a finding for the defendant when there is some evidence tending to prove every essential allegation of the plaintiff's declaration, merely because, in the judgment of the court, the weight of the evidence in support of some material allegation is not sufficient to sustain a verdict for the plaintiff. If the evidence in support of the plaintiff's allegations is sufficient to make a prima facie case, the court is not authorized to direct a verdict for the defendant because of evidence of contrary facts tending to an opposite conclusion. On the motion to direct a verdict only that evidence can be considered which is in favor of the party against whom the motion is directed, and that evidence must be considered in the light most favorable to that party, together with all legitimate inferences which may be drawn from it in his favor."

A case very similar on the facts, is the case of Marle v. Pardington, 116 N.Y.S. 675, where it appears that two cars were proceeding along a highway in the same direction, one following and very near to the other. The leading car stopped suddenly without giving any signal, and as a result the car belonging to the plaintiff in that suit, ran into, against and collided with that of the defendant. The court

at the close of the plaintiff's case directed a verdict, on the ground that the plaintiff was guilty of contributory negligence. The Supreme Court of New York Appellate Division reversed the judgment and ordered a new trial, holding that it was a question for the jury, as to whether or not plaintiff was guilty of contributory negligence.

The Statute in this State, known as the Motor Vehicle Act; Cahill's Revised Stats., chap.95a; par.34; sec. 4, provides as follows:

> "No driver of a vehicle shall suddenly stop, slow down or attempt to turn around without first signalling his intentions with outstretched arm or otherwise, to those following close in the rear."

The only testimony in the record, as contained in the bill of exceptions before us, would indicate that no such signal had been given, and consequently a prima facie case was made out which alone would be sufficient to take the case to the jury. It is impossible to say as a matter of law that such an accident, occurring in such a way, would preclude a recovery because of contributory negligence, because of the numerous facts that would enter into such an occurrence. The condition of the traffic; the place where the accident occurred; the rate of speed at which the cars were running, and all the other circumstances in the case would be necessary for a proper consideration of the case, and it cannot be said as a matter of law that the accident, occurring in the manner in which this one occurred, was one which showed contributory

at the close of the plaintiff's case directed a verdict, on the ground that the plaintiff was guilty of contributory negligence. The Supreme Court of New York (Appellate Division) reversed the judgment and ordered a new trial, holding that it was a question for the jury, as to whether or not plaintiff was guilty of contributory negligence.

The Statute in this State, known as the Vehicle and Traffic Law, Chap. 31, Art. 7, sec. 4, provides as follows:

> "No driver of a vehicle shall suddenly stop, slow down or attempt to turn around without first signalling his intention with reasonable care or caution, so that other drivers may see his act."

The only testimony in the record, as contained in the bill of exceptions before us, would indicate that no such signal had been given, and consequently a prima facie case was made out which alone would be sufficient to take the case to the jury. It is impossible to say as a matter of law that such an accident, occurring in such a way, would preclude a recovery because of contributory negligence, because of the numerous facts that would enter into such a conclusion. The condition of the traffic, the place where the accident occurred, the rate of speed at which the car was running, and all the other circumstances in the case would be necessary for a proper consideration of the case, and it cannot be said as a matter of law that the contract, occurring in the manner in which this car occurred, was one which showed contributory

negligence on the part of the plaintiff, as a matter of law, which would preclude him from a recovery. The trial court, in directing the jury to find a verdict in favor of the defendant, stated that in its opinion nobody could "drive an automobile directly following another truck and claim damages from the man in front of him, if he runs into him." We do not believe that such a statement is the law, but that the question is one of fact for the jury, unless, from the evidence the facts would show such lack of care on the part of the plaintiff that no reasonable minds would differ in regard to it.

On a motion for a directed verdict at the end of the plaintiff's case, the evidence must be viewed in the light most favorable to the plaintiff, together with all the legitimate inferences which may be drawn from it in plaintiff's favor.

For the reasons stated, the judgment of the Municipal Court will be reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

negligence on the part of the plaintiff, or a matter of law, which would preclude his from a recovery. The trial court, in determining the jury to find a verdict in favor of the defendant, stated that in his opinion reason could infer no reasonable directly following accident that the plaintiff became from the use in fact of it, if he was injured. We do not believe that such a statement in the law, is that the question is one of fact for the jury, since, from the evidence the court could draw such inferences part of the plaintiff that an reasonable minds would differ in regard to it.

On a motion for a directed verdict of the end of the plaintiff's case, the evidence must be viewed in the light most favorable to the plaintiff, according him all the legitimate inferences which may be drawn from it in plaintiff's favor.

For the reasons stated, the judgment of the Municipal Court will be reversed and the cause remanded for a new trial.

PRESIDING JUSTICE FRIDRICH.

FELSON, P.J., and ROBSON, J., concur.

247 I.A. 64

120 - 32061

JOSEPH SAPERO and LILLIAN SAPERO, Appellants,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
S. GROSSBERG, et al, Appellees.	

Opinion filed Feb. 9, 1928.

MR. JUSTICE WILSON delivered the opinion of the court.

This cause comes before this court on an appeal from the Municipal Court of Chicago. The plaintiffs' statement of claim in said cause recites that on May 16, 1926, the defendant was in the business of conducting and operating a public garage in the City of Chicago, for the purpose of storing and keeping automobiles; that on the date in question plaintiffs stored a certain automobile, together with a trunk full of clothes, with the defendant; that defendant issued and delivered to the plaintiffs a certain claim check, showing that plaintiffs had left in storage with the defendant a trunk full of clothes in and with an automobile; that on May 17, 1926, when plaintiffs came for said automobile and said trunk, the defendant refused to deliver same to the plaintiffs. The claim is for property loss in the sum of $750.00. The defendant's affidavit of merits recites that the defendant operated a public garage in the City of Chicago; but denies that plaintiff left with the defendant a trunk for safe keeping; and avers that defendant's agent was held up by two thieves, and the car was stolen from defendant's

120 - 3004

[illegible]

[illegible]

v.

[illegible], et al.

[illegible]

[illegible] Filed [illegible] 6, 1964.

[illegible] motion to [illegible]

of the court.

This cause came before this court on an appeal from the municipal court of Milwaukee. The plaintiff statement of claim in said court [illegible] on Jan 12, 1964. The defendant was in the business of manufacturing and operating a public garage in the City of Milwaukee, for the purpose of storing and keeping automobiles. Prior to the commencement plaintiff stored a certain automobile, together with a trunk full of clothes, with the defendant; that defendant learned and believed to the plaintiff's damage [illegible], showing that plaintiffs had left in storage with the defendant a trunk full of clothes is not with an automobile; that on Jan 17, 1964, when plaintiff came for said automobile and said trunk, the defendant refused to deliver same to the plaintiff. The claim is for property loss in the sum of $750.00. The defendant's affidavit of merits states that the defendant operated a public garage in the City of Milwaukee but denies that plaintiff left the defendant a trunk for safe keeping; and states that defendant's agent was told so by the driver, and that out of the driver from defendant's

premises without negligence of defendant. A trial was had before the court without a jury. Plaintiffs' in support of their case introduced testimony for the purpose of showing that the automobile and trunk were left on the date in question at the garage of the defendant, and that they later made a demand in writing upon him, that he turn over to them the car and the trunk and its contents; and then proceeded to prove the value of the contents of the trunk, as bearing on the question of damages. It appears from the testimony that no claim was made for the loss of the automobile. The suit was based solely on the loss of the trunk and its contents.

During the course of the trial it developed that part of the contents of the trunk was the property of Joseph Sapero and the balance was the property of Lillian Sapero, his wife; and that the contents of the trunk was not the joint property of the parties plaintiff. At the end of the plaintiffs' case a motion was made to direct a verdict in favor of the defendant, on the ground that there was an improper joinder of the parties plaintiff, it appearing from the testimony that the property in question was not owned jointly by the plaintiffs, but that part of it was owned individually by Joseph Sapero, and part owned separately by Lillian Sapero.

From the testimony in this cause it is apparent that the plaintiffs had no joint interest in the property, and, therefore, the motion to dismiss was proper. Brady v. Koontz, 145 Ill. App. 592. Before the order of dismissal

premises without negligence or defendant. A jury was not before the court without a jury. Probability in regard of their mere informational sufficiency for the purpose of proof that the automobile was driven at the time in question by the defendant's servant, if at the time they came to make a demand in writing upon him, that he keep away to the end and the issue the authority was given permission to prove the value of the evidence of the witness, on hearing on the question of damages. It appears from the testimony that no claim was made for the loss of the automobile. The suit was based solely on the loss of the trucks and its value.

During the course of the trial it developed that part of the evidence of the trial was the property of Joseph Bagnasco and he claims was the property of Lilia's family, his wife, and that the ownership of the trucks was not the joint property of the parties plaintiff. In the end of the plaintiff's case a motion was made to direct a verdict in favor of the defendant, on the ground that there was no property belonging to the parties plaintiff. In regard to from the testimony that the property in question was not owned jointly by the plaintiffs, but that part of it was owned individually by Joseph Bagnasco, and partly individually by Lilia Bagnasco.

From the testimony in this case it is evident that the plaintiffs had no joint interest in the property, and therefore, the motion should have sustained. Judgment reversed, the motion should have sustained. Judgment reversed, and it is so ordered.

was entered in said cause, or before any judgment had been entered in respect thereto, counsel for plaintiff made a motion for non-suit and directed that a non-suit be taken as to Lillian Sapero, and asked leave to amend the statement of claim by leaving only the name of Joseph Sapero as plaintiff and striking the name of Lillian Sapero. The court denied the motion to take a non-suit and to amend by striking the name of Lillian Sapero, and entered judgment for the defendant. In this, we believe the court erred. At common law the court was powerless to add or strike out parties to a suit but in order to correct this, chapter 7 of the Revised Statutes, known as an Act Concerning Amendments and Jeofails, was passed which made liberal provisions for the amendments to pleadings.

Section 1 of this Act provides as follows:

> "That the court in which an action is pending shall have power to permit amendments in any process, pleading or proceeding in such action, either in form or substance, for the furtherance of justice on such terms as shall be just at any time before judgment rendered therein."

Section 23, chapter 110, of the Revised Statutes also contains the following provisions:

> "At any time before final judgment in a civil suit, amendments may be allowed on such terms as are just and reasonable, introducing any party necessary to be joined as plaintiff or defendant, discontinuing as to any joint plaintiff or joint defendant, changing the form of the action, and in any matter, either of form or substance, in any process, pleading or proceeding which may enable the plaintiff to sustain the action for the claim for which it was intended to be brought, or the defendant to make a legal defense."

The purpose of this statute was to cure the defects of misjoinder or of non-joinder of parties without turning the

case out of court, and to permit of a trial without going through the process of refiling a new suit. This court has permitted the dismissal of parties for misjoinder under similar circumstances. Zukerski v. Armour, 107 Ill. App. 663.

The motion of plaintiffs in the case at bar, made in apt time, to amend the pleadings by striking out the name of Lillian Sapero and dismissing as to her, came well within the meaning of the statute providing for the dismissal of any party plaintiff, and should have been allowed and the cause should have proceeded to judgment as to the sole remaining plaintiff, Joseph Sapero.

For the reasons announced in this opinion, the judgment of the Municipal Court will be reversed and the cause remanded to that court with directions to permit the amendment, by striking out the name of Lillian Sapero, and proceeding to trial as to the remaining plaintiff, Joseph Sapero.

JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

TAYLOR, P.J. AND WILSON, J. CONCUR.

139 - 32080

THE NEW YORK, CHICAGO & ST.LOUIS RAILROAD, a corporation, Appellant,	APPEAL FROM
v.	CIRCUIT COURT,
SAM SCOTT, Appellee.	COOK COUNTY.

Opinion filed Feb. 9, 1928.

MR. JUSTICE WILSON delivered the opinion of the court.

This was an action for possession of certain property by the New York, Chicago & St. Louis Railroad Co. The plaintiff's claim for possession is on the ground that the defendant was occupying the property as a tenant. The property in question is located at or near 103rd street, in the vicinity of Calumet Lake. On the trial, in order to sustain the issues on behalf of the plaintiff, a witness was called by the name of Wilson, who testified that he was yardmaster for the plaintiff, and in 1923, was chief clerk to the superintendent; that the defendant called at his office and wanted to pay rent and get a lease from the plaintiff for the property which was located on the bank of Lake Calumet; that it was a parcel of land 850 feet by 500 feet; that he showed him a lease with the Canal & Dock Company, under which he had paid rent for the previous year; that a few days later the defendant returned and paid him $15.00 as rent for which he gave him a receipt. This receipt was issued in the regular course of business by the witness

as chief clerk of the superintendent; it was signed "H. N. Williams, superintendent," with the initial "W" underneath, which was the initial of the witness. This receipt was given to the defendant and a notice to produce it at the trial was served upon his counsel. Upon failure to produce the original, proof was made of said receipt by introducing in evidence a carbon copy which was taken from the files of the plaintiff company. The witness Wilson testified that he again saw the defendant in November 1923, when he came to his office and talked to him about his lease. A witness by the name of E. M. Smith testified on behalf of the plaintiff that he was general land and tax attorney for the plaintiff, and that he saw the defendant in 1923, on the property in question, and that at that time the defendant talked about renewing the lease for the land he was occupying, and wanted to pay a year's rent; but the witness did not accept it at that time.

The defendant, Scott, testified in his own behalf that he bought the land in question from one Frank Lhotka about 1930 or 1931, but did not remember the exact date; that he paid him for it but did not get a deed; that he paid $15.00 to the witness Wilson but it was not for rent, but for the privilege of cutting the hay on some other property adjacent to that which he occupied. The witness denied having a conversation with Smith in 1923, and stated that he received no receipt from the plaintiff company; and that the $15.00 was for the privilege of cutting hay and not for rent.

The case was submitted to a jury, and verdict

on chief clerk of the municipalities, it was signed "H. B. Williams, superintendent," with the initials "w" underneath, which was the initial of the witness. This receipt was given to the defendant and a notice to produce it at the trial was served upon his counsel. Upon failing to produce the original, proof was made of said receipt by introducing in evidence a carbon copy which was taken from the files of the plaintiff company. The witness Williams testified that he again saw the defendant in November 1903, when he came to the office and talked to him about his loss. A witness by the name of J. J. Smith testified on behalf of the plaintiff that he was general land and tax attorney for the plaintiff, and that in June the defendant in 1903, on the property in question, had told at that time the defendant talked about removing the house from the land he was occupying, and began to put a foundation built but the witness did not accept it as true.

The defendant, Jerry, testified in his own behalf that he bought the land in question from one Frank Lobbs about 1870 or 1871, but did not remember the exact date; that he paid him for it but did not give a deed; that he paid $15.00 to the witness Williams but it was not for rent, but for the privilege of moving the house on other property belonging to Lobbs or somebody. The witness testified himself a substantial citizen said in 1871, he stated that he received no notice from the plaintiff company and that the $15.00 was for the privilege of moving but not for rent.

The case was submitted to the jury, and verdict

returned, finding that the defendant was not guilty of unlawfully withholding the premise in question. A motion for a new trial was overruled and judgment entered on the verdict. It is to reverse that judgment that this appeal is prayed.

It is urged by counsel for the plaintiff that the verdict is against the manifest weight of the evidence, and that the trial court erred in giving to the jury instruction No. 4. In considering the question of the weight of the evidence, this court has not the opportunity of viewing the witnesses as they testify, but it has the opportunity of considering the probability or improbability of the truth of their several statements as shown by the record. On the part of the plaintiff we find the direct testimony of Wilson, who stated that he dealt with the defendant; that he talked with him on several occasions concerning the rent; that he received the rent from him, and that he issued a receipt at the time for the rent. There is also the testimony of Smith, the general land and tax attorney for the plaintiff, that he saw the defendant in 1933, the year in which the receipt was issued, and talked to him about the property, and that the talk was concerning the renewal of the lease on the property. There is also the written evidence of the receipt, dated July 10, 1933, for the year ending April 30, 1934, produced from the files of the plaintiff company, and kept in the general course of business. Opposed to this is the testimony of the defendant alone. His story of purchasing the ground but receiving no deed, on its face is improbable, in view of the fact that the property is of considerable size; that it is located in the city of

returned, finding that the defendants are not guilty of wrongfully attempting the conversion of Jackson, or using for a new trial the overruled the judgment entered on the verdict. It is so ordered that judgment for the defendants is reversed.

IT is hereby ordered that the verdict in favor of the defendants, and that the trial court proceed according to the law; therefore, it is ordered, that the mandate in this cause be sent to the trial court.

The witnesses as to their identity, and in the discretionary of considering the reasonableness of the testimony of the witness, the part of the identified as the proper exercise of discretion, who stated that he dealt with the defendant and he talked with the second conversation regarding the coal that he received the coal from him, and that he learned a receipt at the time for the coal. There is also the testimony of Smith, the general land and tax attorney for the ultimately, that he saw the statement in 1922, the year in which the money was lacking, and talked to him about the property, and within that was concerning the removal of the lease on the property. There is also the written evidence of the receipt, dated July 16, 1919, for the year ending June 30, 1924, received from the firm of the plaintiff company, and that in the general notice of defendant. Counsel on this in the testimony of the defendant stated, the effect of increasing the price, but finally he said, or the Jackson interests, in view of the fact that the property

Chicago, as shown by the street number; and that it was acquired by him through purchase, if acquired at all, at a recent date. It is not probable that a person of adult age, at the present time in the city of Chicago, would acquire a piece of property of the size and importance of the one in question, without fully safe guarding himself by securing some evidence of title.

The giving of Instruction 4, on behalf of the defendant, was error for the reason that this instruction placed upon the plaintiff the burden of proving that at the time of the bringing of the action, it, the plaintiff, was in actual or constructive possession of the premises, when, as a matter of fact, the action was one to recover possession of the property, which at the time was in the possession of the defendant.

We believe the verdict was against the manifest weight of the evidence, and for the reasons stated in this opinion, it will be reversed and the cause remanded to the Circuit Court for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

belongs, as shown by the abstract [illegible], and that it was acquired by him through purchase, [illegible] at a recent date. It is not probable that a person of sound mind, at the present time in the city of Chicago, would acquire a piece of property of the size and importance of the one in question, without fully and [illegible] by [illegible] the evidence of title.

The giving of instruction 6, on behalf of the defendant, was error [illegible] that this instruction placed upon the plaintiffs the burden of proving that at the time of the bringing of the action, [illegible], was in actual and constructive possession of the premises, when, as a matter of fact, the action was one [illegible] possession of the property, which at the time was in the possession of the defendant.

We believe the verdict was against the manifest weight of the evidence, and for the reasons stated in this opinion, it will be reversed and the cause remanded to the Circuit Court for a new trial.

[illegible]

TAYLOR, P.J., [illegible], J., concur.

163 - 32103

EMMA E. CLAUS, Appellee, v. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, (a corp.) Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Feb. 9, 1928.

MR. JUSTICE WILSON delivered the opinion of the court.

The statement of claim in this cause charges that the plaintiff held an insurance policy issued by the defendant company for $1,000, which contained a clause providing that in the event the insured came to her death from bodily injury, effected solely from external and violent and accidental means, then, the defendant would pay the beneficiary $2,000, instead of $1,000 which was to be paid in case of death under ordinary circumstances; that the deceased on October 4, 1924, went to the Meyer Drug Company and asked for Oil of Cedar, and was given a bottle labeled as such, which she took to her home and used; that the fact was that said bottle did not contain Oil of Cedar but did contain Oil of Tansy, which is a deadly poison; and that as a result of taking a portion of the contents of the bottle, she died.

The affidavit of merits filed by the defendant company, after admitting the issuance of the policy, states that the death of the deceased was occasioned by the fact

[illegible] - [illegible]

[illegible] T. [illegible],

[illegible]

v.

[illegible]

[illegible]

Opinion filed [illegible] 8, 1928.

[illegible]

the court.

[illegible]

that she attempted to bring about an abortion on herself, by reason of her pregnancy, and knowingly and wrongfully administered to herself said drug for that purpose, and in doing so she was violating a law of the state, and therefore, a certain other clause in said policy, which provided that the said $1,000 would not be payable in the event death resulted from any violation of the law by the insured, became effective and prevented a recovery for that amount.

A jury was waived and a trial was had before the court, resulting in a finding in favor of the plaintiff and against the defendant, and assessing plaintiff's damages at the sum of $1,000. It appears from the testimony that $1,000 had been paid by the company under the general clause of the policy, providing for payment of that amount in the event of a natural death. Judgment was entered on the finding and an appeal prayed and allowed, to this court.

Emma E. Claus, called on behalf of the plaintiff, testified that she was the mother of Gertrude E. Claus, the deceased, and that her daughter died October 4, 1924; that she was not quite twenty-one years of age, and had been employed as a private secretary; that she was in good spirits prior to her death and did not appear despondent; that on the night in question they found her lying on the bathroom floor; that she had her night gown on; and that she saw a bottle with the label "Oil of Cedar"; that the deceased had been married three days before to one Leonard Somberg; that she, the witness, had noticed that her daughter was unwell about four weeks before she died; that she noticed

this when she did her laundry.

Mrs. John D. Robertson testified on behalf of the plaintiff that she was a sister of the deceased, and that the deceased appeared to be well up to the time of her death, and of a happy disposition.

Dr. William H. Burmeister, called on behalf of the defendant, testified that he had made a partial autopsy and examined the stomach, part of the intestine, and the uterus, and found that the stomach contained approximately a quart of bloody fluid mixed with food material which had a very pungent odor; that the lining of the stomach was very red; and that the uterus was somewhat enlarged and indicated pregnancy of about six weeks duration. He testified that he did not know what Oil of Cedar was used for.

Dr. William D. McNally, for the defendant, testified to somewhat the same facts as the previous witness, but stated further, that Oil of Cedar is used in laboratory work in oil impressions and also as an abortifacient. He testified that he did not make an examination of the uterus at that time.

Three letters were introduced in evidence by the defendant, under an agreement with counsel for the plaintiff, which were signed, "Leona," and appear to have been addressed to the deceased. These letters contain certain references to Oil of Cedar and to the fact that it could be used successfully to abort. The writer stated that she had obtained the prescription from her doctor and that the deceased must not let anybody know that she had told her about it.

A certain finding was presented to the trial court, asking it to find as a fact that Gertrude E. Glaue met her death while attempting and as a result of her attempts to commit an abortion upon herself, and further, that the act was contrary to the law of the State of Illinois. This finding was refused by the court, and so marked.

The cause having been submitted to the court, it is presumed that only such evidence as was material to the issue was considered by it, and that its judgment was based solely upon relevant and proper testimony. The letters referred to, and introduced in evidence were not proper nor binding upon the plaintiff in this action. We are unable to see under that theory counsel agreed to their admission, and we can only assume in this opinion that the trial court did not take them into consideration in arriving at its decision. Such being the case, it became a question of fact for the trial court under the remaining facts in evidence, and, in this connection, we have on the one hand the testimony of the mother to the effect that four weeks prior to the death of the deceased she had observed signs which indicated she had had her usual menstrual period; and also her testimony as to the conduct of the deceased, and that she appeared cheerful and happy; as opposed to the expert testimony of the physicians. The burden was upon the defendant to establish the fact that the deceased at the time of her death was engaged in an unlawful act in attempting to commit an abortion upon herself.

The facts in this case show that the deceased met her death by reason of the use of Oil of Tansy, through a mistake and accident, and not through intentional use. It

is evident from the testimony introduced that at the time of the taking of the liquid contained in the bottle, the deceased understood or was under the impression that it was Oil of Cedar, and that her death was caused by accident, and might not have resulted if she had taken Oil of Cedar, as was her evident intention. Moreover, her intention to commit an abortion in taking Oil of Cedar, does not necessarily follow as she may have taken it for an entirely different purpose.

The trial court heard the evidence, saw the witnesses, and had an opportunity to weigh their testimony. We cannot say as a matter of law that the finding of the trial court was against the manifest weight of the evidence.

For reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

180 - 32121

JACOB PURITSKY, a minor, by Frieda Puritsky, his next friend, Appellee,	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
v.	
GLOBMAN BROTHERS, INC., a corporation, Appellant.	

Opinion filed Feb. 9, 1928.

MR. JUSTICE WILSON delivered the opinion of the court.

The facts in this case show that plaintiff, Jacob Puritsky, was riding a bicycle in an easterly direction along Division street, in the City of Chicago, at about three feet from the curbstone; that at the corner of Campbell avenue, an intersecting street, the plaintiff and a truck belonging to the defendant, Globman Brothers, came into contact, and a collision resulted. According to the testimony of the plaintiff, he heard no horn sounded and did not see the truck; there was nothing at his side nor ahead of him; and he did not know of the presence of the truck until he was struck. A witness by the name of Molly Glyman testified on behalf of the plaintiff, that the truck in question turned at the southeast corner of Campbell avenue and Division street and knocked the boy over. Sarah Remes testified that she saw the truck "going on the bicycle," at the corner and that when she first saw the truck it was back of the boy. David Jerome, the driver of the truck testified that he was going east on

Division street and turned south at Campbell avenue, and as he passed the sidewalk about middle way from the curb, he heard someone scream, and he jumped off the truck and picked up the boy; that as he turned the corner he was going about three miles an hour, the rate of speed prescribed by statute, and that when he picked the boy up, the bicycle was under the right rear wheel of the truck. Max Kaufman testified on behalf of the defendant, that he saw the boy on the sidewalk and that he ran off the sidewalk into the center of the truck. Dr. E. S. Percy testified that he was the doctor in attendance; that he found a fracture of the distal end of the fifth metatarsal bone of the right foot; that he performed a surgical operation -- opened the foot, brought the toe forward and put it in place, and sutured the capsule of the joint, closed the wound and placed the foot in a plaster of paris cast; that the plaintiff was in the hospital for a period of approximately nine weeks; that he again saw him in December, at which time he complained of some pain in his foot; and that he again saw him in February of the next year, at which time he was still complaining of pain in his foot and was walking with a cane.

The cause was submitted to a jury and a verdict was rendered for the sum of $4,083.33 in favor of the plaintiff. Judgment was entered upon that verdict and from that judgment defendant has perfected this appeal.

The principal ground of reversal urged by counsel for the defendant is that the declaration did not contain an allegation of damages, and that, therefore, no cause was made out by the pleadings. It appears that the declara-

tion filed in said cause consisted of five counts and that the last count of the declaration contained an allegation to the effect that the plaintiff sustained damages in the sum of $15,000. The cause was tried upon the first count - all the succeeding counts being dismissed on motion of plaintiff. The first count contains an allegation as follows: "by means thereof plaintiff was injured, and sustained damages as alleged in the last count of this declaration."

The Supreme Court of this State, in the case of Shaughnessy v. Holt, 236 Ill. 485, in its opinion at page 487 says:

> "It is insisted by the appellant that the fourth count having been stricken, it was out of the case for all purposes, (Black v. Harris, 200 Ill. 96,) and could not be used as a basis for the additional counts or be made a part of the three original counts by reference. Under the authority of North Chicago Street Railroad Co. v. Aufmann, 221 Ill. 614, this fourth count furnished sufficient basis for the additional counts filed. After the count was stricken out, while no longer, in legal contemplation, a pleading in the case, it still remained on file as a part of the record. (Abbott v. Douglass, 38 Cal. 295.) It is a mere figure of speech to say that the count is stricken out. Even when a section of the statute has been held to be unconstitutional it may still be considered with the other sections for the purpose of construction. (Baird v. Hutchinson, 179 Ill. 435.) The original fourth count was still a part of the declaration for reference purposes."

The first count directly refers to the allegation in the last count of the declaration, and by reference makes it a part of the same. We believe this was sufficient for the purpose of sustaining the verdict and judgment.

We are unable to say that the amount of the ver-

dict is excessive. The jury saw the witnesses and heard their testimony and was in a position to observe their manner and demeanor while testifying. We cannot say the verdict is against the manifest weight of the testimony.

For the reasons stated in this opinion, the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

284 - 32165

BERTHA WHITE, Appellant,	)	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
v.	)	
ALBERT WHITE, Appellee.	)	

Opinion filed Feb. 8, 1928.

MR. JUSTICE WILSON delivered the opinion of the court.

This matter comes before us on appeal from an order of the trial court, awarding the custody of a minor child of the age of nine years, for a period of six weeks from the date of the entry of the order, to the father, petitioner below, for the purpose of taking the child with him to California on a trip. The original decree for divorce entered in the cause provided that the custody of the children be given to the mother; and that the father should have the right to visit them at reasonable times and places. The order in this cause affects only one child, known as "Jerry;" and it was entered July 7, 1927.

The time in which the order was effective has long since expired and there is no question before this court except a moot question. It would answer no good purpose to pass upon the merits of the case, and this court will not do so, other than to say that in its opinion the facts did not warrant the entering of the order, and that,

234 - EDIT

BEFORE MEDIT.

Appellant,

v.

ALBERT [illegible],

Respondent.

Opinion filed June 6, 1966

Mr. Justice [illegible] delivered the opinion of the court.

This matter comes before us on appeal from an order of the trial court, awarding the custody of a minor child of the age of nine years, for a period of six weeks from the date of the entry of the order, to the father, petitioner herein, for the purpose of taking the child with him to California on a trip. The original decree for divorce entered in the cause provided that the custody of the children be given to the mother and that the father should have the right to visit them at reasonable times and places. The order in this cause affords only the child, known as "Jerry", and it was entered July 7, 1965.

The time in which the order was effective has long since expired and there is no question before this court except a moot question. It would appear to good purpose to have seen the matter at an end, but this court will not do so, rather than be may that it be mistaken on facts not appear the entering of the order, and that

therefore, the costs will be taxed against appellee, petitioner below.

In view of what we have stated in this opinion, the appeal is dismissed.

APPEAL DISMISSED.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

236 - 32177

247 I.A. 643

CARL A. WESTBERG, Appellee, v. YELLOW CAB COMPANY, a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Feb. 9, 1928.

MR. JUSTICE WILSON delivered the opinion of the court.

The facts in this case show that the plaintiff Carl A. Westberg, was the owner of an automobile, and was driving the same north through Lincoln Park, in the City of Chicago, on and along what is known as Lake Shore Drive, at about 10 o'clock on the evening of March 31, 1923. The defendant, Yellow Cab Company, by one of its servants, was driving a certain cab in a southerly direction, over and upon the same drive; and the two cars came into collision, as a result of which both cars were badly damaged.

It is the contention of the plaintiff that he was driving to the right of the center line of the drive in question, while proceeding in a northerly direction; that he was proceeding at a rate of between 20 and 25 miles an hour, at and just prior to the time of the accident; that the Yellow Cab was traveling at a speed of from 30 to 35 miles an hour; that it swung over the center line of the drive and ran into the car which the plaintiff was driving.

Opinion filed Feb. 3, 1988.

The defendant offered evidence to show that the Yellow Cab was traveling west of the center line of the drive in question, and was proceeding at between 20 and 25 miles an hour; that the plaintiff's car was traveling at the rate of between 30 and 32 miles an hour and was upon the west side of the center line of said drive.

A jury was waived and the cause was submitted to the court for trial, which resulted in a finding by the court in favor of the plaintiff and assessing his damages at the sum of $484.59, upon which judgment was entered, and an appeal prayed and allowed to this court.

The defendant, to reverse this judgment, submits for the consideration of this court three propositions. (1) That the court erred in admitting improper evidence on behalf of the plaintiff; (2) That the finding is excessive; and (3) That the finding is against the manifest weight of the evidence.

The facts in evidence show that plaintiff's car was a Lincoln touring car with a winter top; that after the collision it appeared that the front fender, the running board and the rear fender were torn off the car; the axle was bent; the rear left hand tire was off the wheel; the right hand fender was bent, and there was a dent in the left hand front door. The car was towed to the repair shop of Callahan & Kraus, on Michigan avenue, where it was repaired, and a bill for $614.73, covering this repair work, was presented to the plaintiff. The bill was paid by him, and was introduced in evidence. In addition thereto, the superintendent of service for Callahan & Kraus was called and

placed upon the stand. He testified as to the extent of the damage; and the number of hours work performed on said car; and as to the new tires furnished. In our opinion, the damage and the cost of repairs was fully and completely proven.

The plaintiff testified as to just what damage was sustained by his car by reason of the collision, stating in detail the various parts of the machine which had been damaged, and it was these various items of injury that were repaired or replaced by Callahan & Kraus. We believe, therefore, that the contention that there was not a sufficient showing that these repairs were made necessary as a result ofthe collision, was well met by the plaintiff by proving exactly what the injuries were. The receipted bill was admissible to prove that the repairs had actually cost him so much money, and proof of payment of the bill was prima facie sufficient, and it was not error to admit the bill in evidence. In addition, this testimony was fortified by the testimony of the superintendent of the concern that made the repairs. Hyslop v. Matheson, 328 Ill. 362.

The amount of the judgment was less than the bill presented and paid for, and we cannot say that the bill was excessive, in view of the extent of the damage to the car.

The fact of the collision would ordinarily indicate negligence, either on the part of the plaintiff or the defendant, or both. It is evident from the testimony that the collision occurred somewhere close to the center line of the drive, and the court by its finding found that the plaintiff

was in the exercise of ordinary care in driving his car, and the defendant company was negligent. We are unable to say that this finding was not in conformity to the proof.

We see no reason for disturbing the verdict; and for the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

345 - 32186

SOL G. HUDELMAN, Appellee,	)	
v.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
CHARLES L. KELLER, Appellant.	)	

Opinion filed Feb. 9, 1928.

MR. JUSTICE WILSON delivered the opinion of the court.

Plaintiff's statement of claim was based upon a promissory note, dated at Tampa, Florida, January 15, 1926, for the sum of $972.32, payable thirty days after date, to the order of Sol G. Hudelman, plaintiff, and signed by the defendant, Charles L. Keller.

The defendant filed an affidavit of merits and charged that there was a certain contract in writing entered into between the plaintiff and defendant on July 31, 1925, under which plaintiff agreed to pay to party of the second part, $98,700; and which acknowledged the receipt of $5,000 cash, paid on the day and date of the signing and delivery of the agreement. The subsequent payments were to be made from time to time as provided in said contract, and provided for a forfeiture in the event said payments were not made; also provided for the giving of a deed to certain property, free and clear of all encumbrances, upon the fulfillment of the terms and conditions of the agreement. The affidavit further charges that plaintiff failed to pay any further

Opinion filed Feb. 9, 1928.

sums provided by said contract, but made default, and thereby forfeited the $6,000; and that plaintiff, seeking to avoid the loss of said sum requested the defendant to return his money and interest; that the defendant refused, but agreed that in the event said real estate was sold, the defendant would return to the plaintiff, $984.22, out of the proceeds of the sale; and that the note sued upon was given at said time, and was conditional upon the sale of said real estate. Two other additional defenses were filed, setting up the facts set out in the original affidavit of merits and stating further that there was no consideration for the note in question. The first affidavit of merits was ordered stricken from the files, and the amended affidavit thereafter filed was ordered stricken, as well as the third affidavit of merits.

It appears clearly, from the record, that there was a course of conduct or business between the parties involving the sale and purchase of a piece of real estate; that a certain definite sum was paid on the entering into of the agreement; that subsequently the parties met and a new agreement was entered into, evidenced by a promissory note for the sum of $972.22, payable thirty days after date, which is the note upon which this action is predicated.

It is charged in the original affidavit of merits that at the time of the giving of the note it was agreed that it was to be paid out of the proceeds of the sale of the property. This affidavit was sworn to, so that we have a right to assume that this was an original agreement and undertaking between the parties, growing out of the real estate contract hereinbefore referred to.

were provided by mail contract, but were delivered, and thereby forfeited the $4,000; and that identity, serving to cover the loss of said sum remitted the defendant to retain his money and interest; $1,7 the substantial refund, but argued that in the first mail under was paid, the defendant would return to the plaintiff, $2,000, out of the proceeds of the suit; and that the sum mentioned was given to said time, and was constituent upon the sale of said real estate. Two other additional letters were filed, namely, the first, set out in the original affidavit of merits and claiming further that there was no consideration for the note in question. The first affidavit of merits was ordered stricken from the files, and the second affidavit discharged; first was ordered stricken, as well as the third affidavit of merits.

It appears clearly, from the record, that there was a course of conduct or business between the parties involving the sale and purchase of a piece of real estate; that a certain definite sum was paid on the contract for of the agreement; that subsequently the vendee met and a new agreement was entered into, evidenced by a promissory note for the sum of $2,000, payable thirty days after date, which is the note upon which this action is predicated.

It is charged in the original affidavit of merits that at the time of the giving of the note it was agreed that it was to be paid out of the proceeds of the sale of the property. This affidavit was sworn to, so that we have a right to assume that this was an original agreement and constituting between the parties, growing out of the real estate contract originally entered into.

The only question for consideration is whether or not the terms of a negotiable instrument, such as the one in this action, can be varied by a parol agreement. The defense in this case relies upon the condition that the note was to be paid out of the proceeds of the sale of a certain piece of property, so that it is not necessary to consider the rights of the parties to vary the terms of the instrument, other than as the question relates to whether or not the manner of payment can be varied by a parol agreement between the parties.

This question has been passed upon and definitely decided by this court in the case of Gundley v. Drum, et al 237 Ill. App. 587. Under the facts in that case it appeared that a note was given absolute on its face, but it was attempted to defend against said note on the ground that it was to be paid out of the dividends of certain stock, and that at the time this note was given this agreement was understood between the parties, and it was accepted on those terms and conditions. The Negotiable Instrument Act was invoked in that case as a defense as well as a right to show the parol agreement between the parties at the time of the execution and delivery of the note. The court in its opinion at page 591, says:

> "Applying the rule to the facts presented in the case at bar, it is quite apparent that counsel for the defendants appreciated the limits and extent of the rule, for in their pleadings they set up a conditional delivery. Their pleading was 'that the note was not to take effect until sufficient dividends had been declared' upon the stock 'to amount to the face value of said note with interest.' But, in our opinion, it is equally apparent that the proof submitted did not make out the defense thus pleaded. That proof was not to the effect that the delivery of the note was conditional but that the parties had agreed that its payment

was to be conditional and depend on the profits to be derived from the stock in the way of dividends. * * *

That being the situation, it must be held that the defendants delivered the note 'for the purpose of giving effect thereto,' and even if, as the trial court put it in the instruction above quoted, the parties agreed prior to the execution of the note, 'that the defendants would not be liable to pay said note except from the profits' of the company and the company made no profits, the defendants are nevertheless liable in this action because the alleged agreement did not impose a condition precedent to a complete delivery of the note but rather one which applied to the payment of the note and as this contradicted the express terms of the note, to be binding on the parties, it must have been in writing and could not be shown by parol. Hensley v. Mitchell, 147 Ill. App. 181; Schultz v. Meyer, 181 Ill. App. 335; Hesch v. Dennis, 194 Ill. App. 663; Weinstein v. Sprintz, 234 Ill. App. 492; First Nat. Bank of Beecher v. Wolf, 208 Ill. App. 282; Shinner v. Raschke, 213 Ill. App. 324."

In the case at bar, the condition set up in the affidavit of merits appears to be one, as already stated, affecting only the payment, and there was no statement in the affidavit to the effect that there was any condition precedent to the giving of the note. Those facts, having been fully set forth in the original affidavit of merits, and included in the other affidavit of merits, will be assumed to set forth the facts in full, and the allegations of want of consideration will be considered in the light of all the facts as so charged. In the opinion of this court, the facts set out in the original affidavit of merits, together with the giving of the note, would clearly indicate a compromise or settlement of the original contract and the proceedings arising thereunder by the parties.

In the case at bar, the condition set up in the affidavit of service appears to be one, as already stated, affecting only the mortgagee, and there was no evidence in the affidavit to the effect that there was any condition precedent to the giving of the note. These facts, having been fully set forth in the original affidavit of service, and included in the other affidavit of service, will be assumed to set forth the facts in full, and the stipulations of such of conditions will be considered in the light of all the facts as so charged. In the opinion of this court, the facts set out in the original affidavit of service, together with the giving of the note, would clearly constitute a conversion as affecting the original mortgagee and the mortgagee's right of the mortgagee.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

185 - 32126

MAX PTASHNE, Appellee, v. RELIANCE LIFE INSURANCE COMPANY, a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff herein made claim against the defendant for $192.86 as a balance of indemnity alleged to be due to plaintiff under defendant's policy of health insurance. The policy provides for an indemnity of $25 a week, not to exceed 52 consecutive weeks in the aggregate, during confinement in the house on account of sickness or disease which wholly disables the insured and necessitates treatment by a legally qualified physician.

The evidence disclosing such disability and medical treatment therefor for over a year from August 11, 1924, while the policy was in force, was not controverted. The defense was that there was an accord and satisfaction.

It appears that on June 30, 1925, defendant sent a letter to plaintiff enclosing a draft to his order, dated June 29, 1925, for $132.14 to cover liability for the preceding five and two-sevenths weeks. Also enclosed was an undated release. The letter stated that the draft was "in full, final and complete payment of your claim." The release stated that in consideration of such sum from defendant the claimant released and discharged defendant from any and all claim "I now have against it * * * prior to this date," and guarantees defendant against any further liability in consequence thereof. Plaintiff

returned said letter with an endorsement on its back, dated July 5, 1925, saying: "In regard to my Health Claim No. 167390-H would say that the information you received stating that I am fully recovered and at work is not true," and that he was not able to attend to his duties and was still under the doctor's care, and claimed indemnity until fully recovered.

It appears that previous payments beginning October 21, 1924, were made to plaintiff under the policy on different dates and for different amounts by drafts in like form, each accompanied by a like form of undated release for plaintiff's signature, which he in each instance signed when accepting the draft. None of them was dated, and each manifestly was intended to take effect as of the date of the draft accompanying it and not of the date of its being signed, for the next draft covered the period from the date of the prior draft and not the date of the prior release. Hence it is clearly inferable that the last release, now relied upon, was intended to cover only the period for which there was a conceded liability.

It is not questioned that defendant was liable to the amount of said last draft under the provisions of the policy when it was dated. That being so, there was no consideration for a release of future liability.

Defendant recognizes that to constitute an accord and satisfaction there must be an honest dispute between the parties. There was no proof whatever of any existing dispute between the parties as to liability prior to the date of said last draft. The only evidence upon which a claim of an existing dispute as to liability thereafter is the statement in plaintiff's said letter indicating that defendant had received information that he was fully recovered and at work. Plaintiff testified that he did not know that defendant had such information except from its letter -

a mere inference. In other words, he assumed from the form of defendant's letter that it had received such information. But if it had, that fact alone would not indicate the existence of any dispute. There was not any proof whatever that any had arisen, and without an honest dispute such payment could not be construed as an accord and satisfaction. The claimant would hardly be expected to attach any other significance to the last release than was given to the previous releases, namely, as evidencing full payment up to the date of the draft it accompanied. Defendant's letter, therefore, was nothing more or less than an arbitrary repudiation of its contract, it not being shown that it had any previous communication with defendant upon which the claim of an existing dispute could be predicated. There was not, therefore, the slighest ground for such a claim. The judgment will be affirmed.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

a mere inference. In other words, he assumed from the form of defendant's letter that it had received such information. But if it had, that fact alone would not indicate the existence of any dispute. There was not any proof whatever that any had arisen, and without an honest dispute such payment would not be construed as an accord and a satisfaction. The statement would hardly be expected to effect any other legal result than that related than was given to the previous voluntary payments, as evidencing full payment up to the date of the check it accompanied. Defendant's letter, therefore, was nothing more or less than an arbitrary repudiation of its contract. It not being shown that it had any previous communication with defendant upon which the claim of an existing dispute could be predicated, there was not, therefore, any adequate ground for such a claim. The judgment will be affirmed.

Affirmed.

[illegible] and [illegible], JJ., concur.

319 - 31952

PEOPLE, etc., ex rel.
SAMUEL LELAND,
Appellant,

v.

BOARD OF EDUCATION OF THE
CITY OF CHICAGO, a corporation,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the circuit court, entered October 11, 1926, sustaining defendant's demurrer to plaintiff's second amended petition for mandamus and dismissing the petition, which plaintiff elected to stand by. The appeal originally was taken to the Supreme Court, but on April 20, 1927, the cause was transferred to this appellate court, - the Supreme Court holding that it had no jurisdiction of the cause. (People v. Board of Education, 325 Ill. 320.)

The original petition was filed on April 8, 1926. In the amended petition, after stating that defendant is a body politic and corporate, existing by virtue of an act of the legislature, entitled "An Act to establish and maintain a system of free schools," approved and in force June 12, 1909, as subsequently amended, it is alleged that petitioner applied to defendant for a position as a teacher in the public schools, submitted to the required examinations, etc.; that in September, 1907, he was notified that he had been assigned to the McKinley High School, since which time he there continuously served as a teacher until his removal on April 6, 1926; and that at the time of his removal there were in force and effect inter alia, certain rules and

regulations, adopted by defendant on December 9, 1925, known as the "Emeritus" rules (set out in full), wherein it is provided that "hereafter no member of the teaching force shall be continued in classroom or supervisory duties who shall be more than seventy years of age."

It is further alleged that on March 10, 1926, defendant so amended these rules as to make them applicable to teachers or principals of schools who had reached the age of seventy years and had been in active and continuous service for at least fifteen years, that on March 24, 1926, the Superintendent of Schools made written recommendation to defendant (Report No. 14,108) that petitioner, who shortly before had attained the age of seventy years, be assigned to the "Emeritus Service;" that on April 3, 1926, defendant concurred in the recommendation, and notified petitioner of its action transferring him to said service, "subject to the call of the Superintendent of Schools, or of the Board of Education, for consultation, advice, and such other services as may from time to time be required;" and that on April 6, 1926, said order of transfer having become effective, another person took charge of petitioner's classes.

It is further alleged that from the year 1907, when petitioner first entered upon his duties as teacher, until 1921, he received as compensation for his services the annual salary of $1200, and that beginning with the year 1921, and until his transfer, he received $3200; that no written charges were preferred against him; that he does not stand suspended as a teacher; that at all times he has complied with defendant's rules concerning "conduct and efficiency;" that his said transfer "constitutes and is a removal of your petitioner as a teacher within the meaning of sections 138 and 161" of said Schools Act,

as amended; that said rules are unlawful and void, are arbitrary and unreasonable, deprive petitioner of his right to contract for his services, and "deprive him of his property and rights without due process of law;" and that, by virtue of the statutes, his appointment as a teacher had "become permanent and is permanent, subject only to removal for cause in the manner provided for by said sections 138 and 141, as amended," etc.

The prayer of the petition is that the writ issue "commanding the Board of Education to reinstate petitioner as a teacher in the public schools of the city, and restore him to the standing and compensation enjoyed and received on April 6, 1926," etc.

The facts, as alleged, present a case on the merits very similar to that presented in the equity case of Armstrong et al v. City of Chicago et al., No. 32497; in which we have this day filed an opinion and to which reference is made. But, in the amended mandamus petition in the present case, it is to be noticed that there is no allegation that petitioner, at any time or in any manner prior to the commencement of the action, made any demand upon the Board of Education that it reinstate him as a teacher in said schools and restore him to the standing and compensation formerly enjoyed and received. Because it does not affirmatively appear on the face of the petition that such a demand was made and refused, we are of the opinion that the Circuit court was justified in sustaining the demurrer to the petition and dismissing it upon that ground, and only upon that ground. In Murphy v. City of Park Ridge, 298 Ill. 66, it is said (pp. 70, 71): "The peremptory writ of mandamus is not a writ of right. It will not be issued in a doubtful case. The petitioner must by averment and proof show a clear right to the writ. * * Whether demand and refusal to perform were necessary to be averred and proved depends upon whether the act sought to be

coerced involved the public interest or was a mere private right. * * The general rule is, that before applying for the writ of mandamus demand should be made on defendant to perform the particular act or duty and a refusal to comply therewith, but that rule does not apply where the duty is a public one, affecting the public at large. (People v. Green, 281 Ill. 82.)" In State Board of Equalization v. People, 191 Ill. 588, 540, it is said: "In cases, however, where the duty sought to be enforced is of a public nature, affecting the people at large, and there is no one especially empowered to demand its performance, there is no necessity for a demand and refusal." In People v. Town of Mount Morris, 137 Ill. 576, 579, it is said: "But where the person aggrieved claims the immediate and personal benefit of the act or duty the performance of which is sought, he must first make a demand in order to lay the foundation for relief by mandamus." We think that the present case is one where the general rule, requiring the alleging and proving of a demand and a refusal, is applicable, inasmuch as it appears that petitioner is seeking relief by the extraordinary writ for his immediate and personal benefit.

We do not wish to be understood, in view of our holdings as above, that petitioner might not be entitled to the relief prayed for by mandamus, after allegation and proof of demand made for his reinstatement as a teacher in the schools and the refusal of the Board to comply therewith, or to similar relief by proper proceedings in a court of equity.

For the sole reason indicated, the judgment of the Circuit court in dismissing said amended mandamus petition is affirmed.

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

140 - 32081

247 I.A. 644

EMMET KENNEDY, Appellee, v. WILLIAM GRINSHAW, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action of the first class in assumpsit, commenced June 4, 1924, to recover for certain work done by plaintiff as a surveyor from time to time during the months of January to June, 1923, inclusive, there was a trial before a jury in December, 1926, resulting in a verdict for plaintiff for $1240. On March 9, 1927, judgment was rendered upon the verdict against defendant, and he appealed.

In his statement of claim plaintiff alleges that defendant is indebted to him in the sum of $1240, for certain surveying work done on defendant's Glen Ellyn property; that the work covered 28 days of field work, for which the reasonable and customary fee is $35 per day, and 13 days of office work, for which the reasonable and customary fee is $20 per day; and that all the work was done at defendant's request.

In defendant's affidavit of merits he denied any indebtedness to plaintiff, and alleged that such surveying work was not done at his (defendant's) request, and that he is not liable therefor.

Upon the trial plaintiff was a witness in his own behalf. He introduced in evidence a certain written agreement executed in April, 19[illegible], and signed by defendant and by H. J. Bergendahl, an architect and contractor, and also a copy of a certain itemized bill for the work, dated August 1, 1923,

and addressed to "William Grimshaw by H. J. Bergendahl." Bergendahl and three other witnesses, relatives or employees of plaintiff, testified for plaintiff. Defendant was the only witness in his behalf.

In December, 1922, or early in January, 1923, defendant (Grimshaw), being the owner of a tract of land in Glen Ellyn, DuPage County, Illinois, and being desirous of having it subdivided, graded and improved with dwelling-houses and other improvements, made a verbal agreement with Bergendahl. This verbal agreement was embodied afterwards in a written agreement, executed in April, 1923. In the 1st paragraph Bergendahl (2nd party) agrees to construct from 21 to 25 houses, 4 or 5 at a time, on the land, and "to survey, plat, landscape, and provide sidewalks, hard surface roadways, sewers and water-mains with proper connections, and to erect complete" the houses "at an approximate cost of $12,000 for each house." Then follow brief specifications as to the houses, provisions that they are to be erected in accordance with plans to be prepared by Bergendahl and approved by Grimshaw (1st party), and that all sub-contracts for labor and material are to be approved by Grimshaw, etc. In the 2nd paragraph Bergendahl agrees to "negotiate loans" on the houses, sufficient to cover the construction cost of each; and Grimshaw agrees to "execute notes secured by trust deeds" on each of the houses and lots, each note to be approximately $12,000, and that the money so borrowed is to be used towards the payment of the construction of each house. Then follow provisions that all expenses incurred in the making and completing of the loans, and in selling the houses after completion, "shall be paid out of said loan and the balance of said loan to be used (1) for the purposes set forth in paragraph No. 1, and (2) to the payment of not more than $250 per house" to Bergendahl "on

account of construction profit." In the 3rd paragraph it is agreed that construction work on any of the buildings shall not be commenced until a loan of sufficient amount has actually been consummated to pay for the construction of the particular building, free and clear of mechanics' liens. In the 4th paragraph it is agreed that Grimshaw "shall not be liable to expend any moneys in and about the surveying, platting, landscaping, etc., * * in excess of the loans secured on said buildings." In the 5th paragraph it is agreed that, upon the completion of any house, Grimshaw will use his best endeavors to sell it within 90 days; and if it is sold for cash there shall first be paid to Grimshaw $60 per front foot of the lot on which it stands, and then $1000, less any sums received from said loan, to Bergendahl "as construction profit"; and that the balance of moneys realized from the sale, after deducting taxes, interest on encumbrances and expenses in selling and holding said property, "shall be divided equally" between Grimshaw and Bergendahl.

The evidence further disclosed that early in January, 1923, Bergendahl interviewed Kennedy, informed him of the substance of his contract with Grimshaw, and personally hired Kennedy to do certain surveying work on the property. Kennedy immediately started on and did certain field and office work in connection with the surveys from time to time during the months of January to April, 1923, inclusive. He claims also to have done three days work in May and eight days work in June. Grimshaw did not hire Kennedy and never requested him to do any surveying work. Bergendahl, late in April or early in May, 1923, became financially embarrassed, and bankruptcy proceedings were commenced against him. He had not then negotiated any loans on any of the property, as provided in the contract, and had not commenced to build any houses. He testified: "I did not go through with the contract. I got as far as to figure

estimates and to receive figures from sub-contractors. Then I had some financial difficulties, * * and it was getting late. It was getting to May, and we decided to call the contract off, and it was called off." He further testified that about this time Kennedy rendered a bill to him for the surveying work and demanded payment, no part of which he paid; that about August 1, 1923, Kennedy sent him an itemized bill, with the request that he "O.K." it and forward it to Grimshaw; but that he is "not certain" that he did so forward it.

Kennedy testified that at Bergendahl's request he started on the surveying work about January 3, 1923; that he then knew that Bergendahl was working for Grimshaw under some kind of a contract and was about to erect certain buildings on Grimshaw's property; that he "first billed Grimshaw" for the work by sending on August 1, 1923, an itemized bill for $1240 to Bergendahl, with the request that the latter forward it to Grimshaw; that prior to this time he never sent any bill to Grimshaw; and that afterwards he mailed to Grimshaw a number of unitemized bills for $1240 on the first of succeeding months, but never heard from him in reply.

After reviewing the evidence we are of the opinion that the verdict and judgment are contrary to the evidence and the law, and that the judgment cannot stand. We do not think that, when Bergendahl hired Kennedy to do the surveying work, he did so as agent of Grimshaw. On the contrary it appears that he employed Kennedy to do such work on his individual account, and in accordance with the express terms of the contract, of which Kennedy had notice when he accepted the employment, and which provided that he (Bergendahl) should "survey, plat, landscape," etc., the property, and which further provided that Grimshaw should "not be liable to expend any moneys in and about the surveying, platting, landscaping, etc., * * in excess of the loans secured on said

buildings." Because of Bergendahl's financial troubles, he did not negotiate or secure any loans for any proposed building, and no building was in fact erected or even started by him, and by agreement between the parties to the contract it was called off. Prior to this time Kennedy had sent a bill for his services (in what amount does not appear) to Bergendahl - thus recognizing the latter as his debtor. It was not until after Bergendahl had become financially embarrassed and unable to pay Kennedy for the work, that the latter first sought to obtain payment from Grimshaw. Furthermore, we do not think that the actual work done by Kennedy, or the reasonable value thereof, was shown sufficiently by the evidence to warrant the return of a verdict in his favor in the sum of $1240.

Plaintiff's counsel here contends that such verdict can be sustained upon the theory of an account stated, inasmuch as the evidence shows that Kennedy for several successive months prior to the commencement of suit mailed unitemized bills for $1240 to Grimshaw, and that the latter did not object or respond to them in any way. One sufficient answer to this contention is, we think, that plaintiff did not in his statement of claim make any claim of an indebtedness by reason of an account stated.

For the reasons indicated the judgment of the Municipal Court is reversed and the cause is remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Scanlan, J., concur.

100 - 32040

J. M. BICIAN, Appellee, v. EUGENE SKACH, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

J. M. Bician, plaintiff, sued Eugene Skach, defendant, in the Municipal Court of Chicago in an action of the first class. The case was tried before the court without a jury and there was a finding for the plaintiff in the sum of $2083.44. Judgment was entered on the finding, and this appeal followed. Plaintiff's claim was for principal and interest alleged to be due from the defendant on two promissory notes, signed by the defendant and payable to the plaintiff, and each for the sum of $1000 with interest at the rate of four per cent. The defendant admitted the making of the notes and the receipt of the $2000, but claimed that he had paid the same.

The defendant contends that the finding of the trial court is against the manifest weight of the evidence. After a careful examination of the record we find ourselves unable to agree with this contention. The trial judge in his decision indicated his belief that the witnesses for one side or the other had not told the truth, and we concur in this conclusion of the court. He saw the witnesses and had better opportunities than we to test their credibility and to determine the weight that should be attached to their testimony, and we are satisfied that we would not be justified in disturbing the finding that he made.

The defendant next contends that the court erred in allowing the plaintiff to testify that while he was in Europe he received a letter from the defendant and that the letter contained the statement that Mr. Mayton (who had given the plaintiff a note for money borrowed) had paid off the principal of the note, amounting to $1600. The letter was not produced in evidence and the point is made by the defendant that the plaintiff did not make out a prima facie showing that the letter was lost and that therefore the court erred in admitting evidence as to its contents, over the objection of the defendant. It may be conceded that the evidence does not show that the letter was lost. On a trial by a court without a jury, this court will not presume that the admission of improper evidence misled the court below, but it will be presumed that the court did not consider any immaterial or improper evidence in reaching a decision, especially where there is proper evidence to justify the judgment (Merchants Disp. Trans. Co. v. Joesting, 89 Ill. 152; Rogers Grain Co. v. Shepherd, 116 Ill. App. 532; Sieres v. Jacobs, 157 Ill. App. 441), and in the present case there was competent evidence to justify the finding of the court. In addition, it appears that the defendant did not in any way contradict the plaintiff's testimony with reference to the letter and its contents.

The defendant contends that in any event the evidence shows that the defendant paid a little over $530 on the two notes and that the court in its finding failed to give the defendant credit for the same. We have considered the contention and we find it without merit.

In deciding the case, the trial court stated that the burden of proof was on the defendant to prove payment of the notes, and the defendant contends that the court erred in its

conclusion as to the law. No propositions of law were submitted to the court by either side, and in such a state of the record it is presumed upon appeal that the court correctly applied the law to the facts, but in any event the law was correctly stated by the trial court. The defendant admitted the making of the notes and his defense was that he had paid the same, and the burden was on him to make out that defense.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

143 - 32084

EMMA KOENIG et al., Appellees,	APPEAL FROM MUNICIPAL
v.	COURT OF CHICAGO.
JOSEPHINE HAMMER, Appellant.	

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The plaintiffs, Emma Koenig and William H. Koenig, filed a complaint in forcible detainer in the Municipal Court of Chicago against the defendant, Josephine Hammer, alleging that they were entitled to the possession of certain premises in the City of Chicago and that the defendant was unlawfully withholding the possession of the same. The case was tried before the court without a jury and a finding was made in favor of the plaintiff. Judgment was entered on the finding and this appeal followed.

The defendant contends that the plaintiffs failed to make out a prima facie case entitling them to judgment and that the court erred in not finding the issues for the defendant. On the trial of the case the plaintiffs offered in evidence the following contract:

> "ARTICLES OF AGREEMENT, Made this seventeenth day of February in the year of our Lord One Thousand Nine Hundred and twenty-seven (1927) Between Mrs. Josephine Hammer, a widow, party of the first part, and Emma Koenig and William H. Koenig, her husband, party of the second part: Witnesseth, That, if the party of the second part shall first make the payments and perform the covenants hereinafter mentioned on their part to be made and performed, the said party of the first part hereby covenants and agrees to convey and assure to the said party of the second part, in fee simple, clear of all incumbrances whatever, by a good and sufficient Warranty Deed, the lot, piece, or parcel of ground, situated in

the County of Cook and State of Illinois known and described as Lot twenty-one (21) in Block three (3) in A. J. Hawke's South Park Subdivision of the Southwest quarter (SW¼) of the Northeast quarter (NE¼) and the north three fourths (3/4) of the East half (E½) of the Northeast Quarter (NE¼) of the Southeast Quarter (SE¼) of Section 22 Township 38 North, Range 14 East of the 3rd Principal Meridian and the said party of the second part hereby covenants and agrees to pay to the said party of the first part the sum of Fifty Five Hundred and 00/100 Dollars in the manner following: One Hundred Dollars ($100.00) in cash, the receipt of which is hereby acknowledged, Three Hundred Dollars ($300.00) April 1, 1927, and Fifty Dollars ($50.00) per month due on the 1st day of April,1927, and each and every month thereafter until Three Thousand Five Hundred Dollars ($3,500.00) has been paid, at which time the party of the first part agrees to give a Warranty Deed, the remaining indebtedness to be evidenced by a first Mortgage upon the property, the duration of which will be for a period of three years. Payments to be made at the Washington Park National Bank with interest at the rate of six per centum per annum payable monthly on the whole sum remaining from time to time unpaid, and to pay all taxes, assessments, or impositions that may be legally levied or imposed upon said land, subsequent to the year 1926. And in case of the failure of the said party of the second part to make either of the payments, or any part thereof, or perform any of the covenants on their part hereby made and entered into, this contract shall, at the option of the party of the first part, be forfeited and determined, and the party of the second part shall forfeit all payments made by them on this contract, and such payments shall be retained by the said party of the first part in full satisfaction and in liquidation of all damages by her sustained, and she shall have the right to re-enter and take possession of the premises aforesaid.

Chicago Title & Trust Company's Owner's Policy will be delivered at the time the Warranty Deed is delivered.

It is Mutually Agreed By and between the parties hereto, that the time of payment shall be of the essence of the contract; and that the covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, administrators and assigns of the respective parties.

In Witness Whereof The parties to these Presents have hereunto set their hands and seals, the day and year first above written.

Josephine Hammer (Seal)
Emma Koenig (Seal)
W. H. Koenig (Seal)

Sealed and Delivered in Presence of Joseph B. Grigsby"

This contract was admitted in evidence and the bill of exceptions shows that the plaintiffs offered no further evidence and that the defendant offered no evidence, but that her attorney stated to the court "that the defendant had not taken and would not take any of the moneys theretofore paid by the plaintiffs to the Washington Park National Bank, as shown by plaintiffs' Exhibit 1, and that the defendant would not deliver possession of the property described in the contract by reason of the failure of plaintiffs to carry out the same."

Even if we assume that the defendant, by the statement of her attorney, admitted possession of the property in the defendant, and if we further assume that the contract in question could form the basis of an action in forcible detainer, nevertheless, as there is no proof as to performance by the plaintiffs it is perfectly clear that the plaintiffs failed to make out a prima facie case of right of possession of the premises in the plaintiffs. As the question may not arise on the second trial of the cause, we do not deem it necessary to pass upon the contention of the defendant that in any event the contract could not be the basis of a suit in forcible detainer.

The judgment of the Municipal Court of Chicago is reversed and the cause is remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

This document was written in evidence and the jury of acquiescence shows that the plaintiffs offered no further evidence and that the defendant offered no evidence, but that her attorney asserts to the court "that the defendant has not taken and would not take any of the assets therein claimed by the plaintiffs to the Washington Park National Bank, as alleged by plaintiffs' exhibit 1, and that the instrument would not affect possession of the property described in the contract by reason of the issuance of plaintiff's money and the same."

Even if we assume that the defendant, by the execution of her signature, limited possession of the property in the contract, and if we further assume that the contract in question would fall within the rule of a revocable trust, nevertheless, there is no proof or no performance by the plaintiffs is perfectly clear that the plaintiffs failed to make out a prima facie case of right of possession of the property in the plaintiffs. So the question may not arise on the second trial of the cause, we do not deem it necessary to pass upon the contention of the defendant that in any event the contract could not be the basis of a suit in legislate equitable.

The judgment of the municipal court of Chicago is reversed and the cause is remanded.

REVERSED AND REMANDED.

Matson, P. J., and Gridley, J., concur.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of April, in the year of our Lord one thousand nine hundred and twenty-seven, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. ~~AUGUSTUS A. BARTLOW,~~ FRANKLIN H. BOGGS Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On SEP 29 1927 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

E. L. Yocum, Appellee,

v.

W. J. Taylor, Appellant,

Appeal from the County Court of Stark County.

Jones J:

Appellee, E. L. Yocum, recovered a judgment for $392.76 against appellant, W. J. Taylor, in the County Court of Stark County, in a suit for distress for rent.

The facts are not in dispute, no evidence having been offered by appellant. On September 9, 1925, a written lease was entered into between Yocum as lessor and Taylor as lessee for 120 acres of land. The term was from March 1, 1926 to February 28, 1927. The lease was signed by Taylor, and on behalf of appellee it was signed, "E. L. Yocum, Elmer Craig, Agent". When the lease was offered in evidence, appellant objected to it on the grounds that there was no foundation for its introduction; that there was nothing to show that Craig was the agent of Yocum, or that he had authority to execute it. The objection was overruled and this ruling is the principal error urged for the reversal of the judgment. The contention of appellant is that the suit was based on the lease and as it was improperly admitted in evidence, there is nothing to show the existence of the relationship of landlord and tenant; hence there should have been no recovery.

There are several answers to this contention. Section 52, Chapter 110, of the Revised Statutes, provides that no person shall be permitted to deny, on trial, the execution of any instrument in writing, whether sealed or not, unless the person so denying the same shall, if defendant, verify his plea by affidavit. Appellant filed only the general issue together with a notice of set off. There was no plea denying the execution

Appellee, W. E. Young, recovered a judgment for $[illegible].76 against appellant, W. C. Boyles, in the Twenty Fourth of Park County, in a suit for damages for rent.

The facts are not in dispute, no evidence having been offered by appellant. [illegible] lease was entered into between Young as lessor and Boyles as lessee for 120 acres of land. The term was from March 1, 1926 to February 28, 1927. The lease was signed by Boyles, and on behalf of appellee it was signed, "W. E. Young, Fifty Years, Agent". When the lease was offered in evidence, appellant objected to it on the grounds that there was no foundation for its introduction; that there was nothing to show that Young was the agent of Young, or that he had authority to execute it. The objection was overruled and this ruling is the principal error urged for the reversal of the judgment. The contention of appellant is that the suit was based on the lease and as it was improperly admitted in evidence, there is nothing to show the existence of the relationship of landlord and tenant which should have been the recovery.

There are several answers to this contention. Section 32, Chapter 124, of the Revised Statutes, provides that no issue should be permitted to deny, on trial, the execution of any instrument in writing, [illegible] by denying the same shall, if referred, verify the plea by affidavit. Appellant filed only the general issue [illegible] a matter of new [illegible]. There was no plea denying the execution

of the lease and no affidavit of any kind was filed. Such failure to plead under oath excludes the execution of the instrument sued on as an issue and made the lease admissible without proof of its execution. (Gould v. Magnolia Metal Co. 207 Ill. 172.) It is not disputed that the lease was signed by the lessee, Taylor, and that he took possession of the demised premises under the lease. A lease need not be signed by both landlord and tenant, but the tenant's signature is sufficient. (Cook v. Curry, 192 Ill. App. 185; Pottinger v. Erhardt, 183 id. 169; Gradle v. Warner 140 Ill. 123.) There is evidence, to which appellant made no objection, that when Craig signed the lease he did so as agent for Yocum. Even if there were any doubt about Craig's authority to sign the lease, his act was ratified by his principal, who accepted the lease and brought suit to enforce it. Under all these facts the court properly admitted the lease in evidence.

Appellant complains because the court permitted Yocum to prove that appellant had not carried out the provisions of the lease and therefore was not entitled to a credit of $2.00 per acre on the grass land, yards and orchards. It is claimed that the effect of the court's action was to permit the lessor to recover damages for a breach and that this cannot be done in an action for distress for rent. Bates v. Hallihan 220 Ill. 21 is cited in support of this contention. In that case the lease provided for the assessment of damages for a failure to raise as much grain as could have been done if the tenant had exercised good husbandry and it was held that the distress for rent could only be maintained for rent due, and that damages cannot be ascertained in such a proceeding. That case is not controlling here. In the case at bar, the lease provided for a cash rental of $9.00 per acre for grass lands, yards and orchards, to be

of the lease and no affidavit of any kind was filed. That failure to plead under oath, omitting the execution of the instrument sued on as an issue and made the issue admissible without proof of its execution. (Gould v. Imperial Ins. Co. 207 Ill. 172.) It is not disputed that the lease was signed by the lessee, Taylor, and that he took possession of the leased premises under the lease. A lease need not be signed by both landlord and tenant, but the tenant's signature is sufficient. (Ford v. Shaw, 124 Ill. App. 488.)

109; Cunnie v. Lemmer 140 Ill. 109.) There is evidence, to which appellant made no objection, that Tom Taylor signed the lease he did so as agent for Crane. Even if there were any doubt about Crane's authority to sign the lease, his act was ratified by his principal, who accepted the lease and brought suit to enforce it. Under all those facts the court properly admitted the lease in evidence.

to prove that appellant had not earned and the payment of the lease and therefore was not entitled to a credit of $6.00 per acre on the grass land, yards and orchards. It is claimed that the effect of the court's action was to permit the lessor to recover damages for a breach and that this cannot be done in an action for distress for rent. Weber v. Williams 280 Ill. 21 is cited in support of this contention. In the 3 case in lease provided for the assessment of damages for a failure to release as much grain as could have been done if the tenant had exercised good husbandry and it was held that the landlord for rent could only be maintained for rent due, and that damages cannot be ascertained in such a proceeding. That case is not controlling here. In this case at bar, the lease provided for a cash rental of $3.00 per acre for grass lands, yards and orchards, to be

due October 1, 1926. There were 43.64 acres of such land. The lease further provided for a credit of $2.00 an acre for this land, provided appellant performed certain services under the lease. The undisputed evidence is that he did not perform the services which were to be the basis of the credit, therefore he was not entitled to the credit. No question of damages for breach of contract or failure to perform the terms of the lease is involved in this suit. The trial court properly admitted the proof objected to.

We find no error in the record and the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty- _____

_____
Clerk of the Appellate Court

(53761—3M—7-27)

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-seven, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JAN 10 1928 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 7766 Agenda No. 36

In The

APPELLATE COURT OF ILLINOIS,

Second District

April Term, A. D. 1927

JAMES H. SULLIVAN, Plaintiff and Appellee, vs. WILLIAM A. HICKEY and DENNIS J. HICKEY, JR., Copartners, Doing Business Under the Style and Firm Name of Hickey Bros., Defendants and Appellants.	Appeal from Circuit Court, Rock Island County.

OPINION By [illegible], J.

An action was instituted by appellee against appellants in the Circuit Court of Rock Island County, to recover for injuries suffered by him in a collision with a delivery truck belonging to appellants and being driven by one J. D. Bricker.

The declaration consists of three counts. The first count charges general negligence. The third charges a violation of the statute relating to speed of motor vehicles in cities, etc. The second count charges that while appellee was riding on a bicycle in an easterly direction on Seventh Avenue in the City of Rock Island, that appellants possessed a motor vehicle in charge of one of their servants who was then driving the same on said avenue in a westerly direction; "that as he (appellee) was so proceeding on said bicycle in the direction aforesaid along said public street, the said defendants then and there by their servant willfully and carelessly drove and managed the said motor vehicle at a high and

dangerous rate of speed and without keeping a lookout ahead for other travelers upon said public street and without having said motor vehicle under his control, and along the southerly side of said street, south of the center thereof, and by means of said willful and wanton and reckless conduct of the driver of the said motor vehicle, the said motor vehicle then and there ran and struck with great force and violence upon and against the said bicycle which the plaintiff was riding, and thereby the plaintiff was then and there thrown with great force and violence from off his said bicycle," receiving the injuries for which the suit was instituted, etc.

To said declaration appellants filed a plea of the general issue. A trial was had, resulting in a verdict in favor of appellee for $12,500. A new trial was awarded, resulting in a verdict in favor of appellee for $18,500, upon which judgment was rendered. To reverse said judgment, this appeal is prosecuted.

It is first contended by counsel for appellants that the second count of appellee's declaration does not in effect charge a willful and wanton injury, and that therefore the court erred in submitting that issue to the jury. In support of this contention counsel cite Burns v. Chicago & Alton R. R. Co., 229 App. 170; Moore v. Prevett, 229 App. 255; Harris v. Piggly Wiggly Stores, Inc., [illegible].

Counsel for appellee practically concede that if the sufficiency of said count is to be determined upon the principles laid down in the above mentioned cases, it is not sufficient. They insist, however, that throughout the trial of said cause counsel on both sides treated said count as a sufficient charge of a willful and wanton injury.

An examination of the record discloses that this is true. Appellants' eleventh given instruction was as follows:

"You are instructed that unless you believe from a preponderance of all the evidence that the driver of the truck of defendants

consciously and intentionally drove his truck westwardly on Seventh Avenue in such a reckless and wanton manner as showed an utter disregard for the safety of others, then you will find the defendants not guilty under the second count of the declaration."

Appellants' ninth and tenth given instructions close with these words: "Then you will find the defendants not guilty, unless you believe that the driver of the truck was guilty of willful and wanton negligence." So that, in three instructions given by appellants, that question was submitted to the jury. Where both parties to a suit submit instructions declaring the rules of law applicable to the facts proven, and request the jury to return their verdict in accordance with those rules of law, as applied to the facts proven, neither party can be heard to complain that such facts were not within the scope of the allegations of the pleadings under which those facts were permitted to be proven. Illinois Central R. R. Co. v. Latimer, 188 Ill. 168-171; Illinois Coal Co. v. Novak, 184 Ill. 501-504; C. & A. R. R. Co. v. Harrington, 192 Ill. 9-27; Donk Bros. Coal Co. v. Stroetter, 229 Ill. 134-138; Wheeler v. C. &. W. I. R. R. Co., 267 Ill. 306-325; Hough v. Kaskaskia Live Stock Ins. Co., 230 App. 341-346.

It should also be observed that appellee's third instruction, which refers to the second count of his declaration, lays down the rule as to what constitutes a willful and wanton act, practically as contended for by appellants. Appellants are therefore not in a position to question the sufficiency of the second count of the declaration.

It is also seriously contended by counsel for appellants that the verdict of the jury is against the manifest weight of the evidence.

Thirty-fourth Street in the City of Rock Island runs north and south, and intersects with Seventh Avenue from the south, but does not cross the same. Seventh Avenue runs east and west, and

connects the cities of Rock Island and Moline. It is paved with asphalt, and slopes downward from Thirty-second Street, easterly to about Thirty-eighth Street. Thirty-fourth street slopes downward as it approaches Seventh Avenue. There is a cut on Thirty-fourth street, and the lots are terraced. The evidence tends to show that the intersection of these streets is in an outlying residential portion of said city.

On the morning of September 9, 1919, between 7 and 7:30 o'clock, appellee, an electro-plater employed in Moline and living in Rock Island, was on his way to work. He was coming down Thirty-fourth Street, and turned east on Seventh Avenue, where he collided with appellant's Ford truck, some thirty to thirty-five feet east of the east line of Thirty-fourth street. Appellee fell on the hood of the truck, struck or went through the windshield, and received the injuries complained of.

Appellee, J. D. Bricker, James H. O'Leary and William McCummins, were the only eye-witnesses to the collision.

Appellee was the only witness who testified on his behalf with reference to the speed of appellants' truck. He testified: "I am not able to remember and say now and give a judgment on the speed of that car. It was going fast." The only witnesses on behalf of appellee with reference to his speed just prior to and at the time of the collision were himself and the witness O'Leary.

Appellee testified: "My bicycle was traveling about eight miles an hour as I came down Thirty-fourth street down the hill there. Just before I reached the intersection there was a change in the speed of my bicycle, a slight slack down for the turn of the corner. My brakes were working good and responded when I applied them. My bicycle was under control at that time. As I entered Seventh Avenue my eyes were directed to the west. * * * When I first saw the automobile it was about twenty feet ahead of me, on the south side of Seventh Avenue; it was about halfway between the

center and the south curb."

The witness O'Leary testified "I wouldn't really know as to the speed at which the automobile truck was running. I couldn't say as to the speed at which Mr. Sullivan was traveling. He wasn't going fast or slow, just a moderate speed, I should say. I don't remember as I saw the automobile after it came to a stop after the accident."

The witnesses on behalf of appellants with reference to the speed of said truck testified as follows:

Bricker, the driver of the truck, testified he was going about fifteen miles per hour coming up-hill; that his car traveled about eight or ten feet after the collision; that he was not able to tell how fast appellee was going. "I judge he was going fast." W. H. Beeler testified that appellants' truck passed him on Seventh Avenue about one hundred feet east of the point of the collision and was then going about ten or twelve miles an hour. William McCummins, an eye-witness of the collision testified that at the time of the collision the truck was traveling about twelve miles per hour.

There was a conflict in the evidence as to the speed appellee was traveling on his bicycle and also as to the speed of appellants' truck, just prior to and at the time of said collision. There is also a conflict with reference to where the accident occurred. The evidence on the part of appellee and his witnesses tends to show that the collision occurred on the south side of the center of Seventh Avenue, while the testimony on behalf of appellants is to the effect that it occurred on or north of the center line of said street.

As this case will have to be tried again, we express no opinion on the weight of the evidence, other than to say it is conflicting. The rulings of the trial court on the evidence and the instructions should therefore have been accurate.

It is contended by appellants that the court erred in excluding their exhibit 1, a statement by the witness O'Leary. This statement, which bears date September 8, 1919, is to the effect that the speed of appellants' truck at the time of the collision was not over twelve to fifteen miles per hour; that the bicycle appellee was riding on "was going at a good grade of speed, coming down grade, I would judge he was going about twenty miles per hour; he turned suddenly to the east and collided head-on with Hickey Brothers' truck. * * * The auto ran about ten feet after the collision. * * * In my opinion the accident was unavoidable."

Appellee insists that the court did not err in excluding this statement, because it contains matters of opinion, particularly the statement that "the accident was unavoidable." That objection was not made. Not having been made, the court should have admitted the statement, if otherwise admissible. Objections of this character must be particularly pointed out, so that the court may eliminate the objectionable part from the offered evidence. McCann v. People, 226 Ill. 562-569.

It is also said that there was no error in excluding this statement, for the reason that O'Leary did not testify as to the speed of said truck or the speed of said bicycle. This witness was asked on direct examination with reference to these matters and stated that he was not able to judge of the speed of the truck; that the bicycle was "not going fast or slow, but just moderate."

Appellee having examined the witness on the speed of said truck and bicycle, and the witness having stated that he was not able to estimate such speed, appellants had the right to identify his statement and have it admitted in evidence, as tending to show that at that time he had stated an opinion with reference to these matters by way of impeachment. Chicago City Ry. Co. v. Matthieson, 212 Ill, 292-294. The court erred in excluding this statement, only a general objection having been made thereto. McCann v. People,

supra, 569.

It is next contended that the court erred in admitting appellee's exhibit a. This exhibit was a sketch or plat made by the witness Lindberg, who testified on behalf of appellee. This plat was not drawn to scale. It contains memoranda with reference to some of the matters in controversy, and in our judgment should not have been admitted, although it is not of that serious nature that we would for that reason alone reverse the case, especially in view of the fact that the witness who made the sketch or plat testified with reference to the matters which are undertaken to be set forth on said plat. Justen v. Schaaf, 175 Ill. 45-49; Zinser v. Sanitary District of Chicago, 175 App. 9-21.

It is also contended that the court erred in striking the testimony of appellant William A. Hickey, to the effect that he and his co-appellant carried no insurance "which would protect us against the payment of this loss." The court did not err in this ruling, as the question of whether appellants carried such insurance was not an issue in the case, and was not proper to be submitted to the jury.

It is also contended that the Court erred in overruling the objection to the following question asked witness Dr. DeSilva.

"Q. What may be the result of this injury that Mr. Sullivan suffered, to his future mentality?"

Objection having been made and overruled, the witness answered:

"A. Lessening of his mental faculties."

The question called for a speculative answer, and the court should have sustained the objection. Stevens v. Illinois Central R. R. Co., 306 Ill. 370-377; Lauth v. Chicago U. T. Co., 244 Ill. 244-251, citing: Lake Shore & M. S. Ry Co. v. Conway, 169 Ill. 505; Chicago & M. E. Ry Co. v. Ullrich, 213 Ill. 170; Chicago City Ry Co. v. Henry, 218 Ill. 92; Amann v. Chicago C. T. Co., 243 Ill. 263.

It is next contended that the court erred in giving the third, fourth, sixth and eighth instructions given on behalf of appellee.

The third instruction undertakes to state to the jury the nature of the second count of appellee's declaration, and then instructs the jury that if they "find from the evidence that the driver of the defendants' automobile operated his automobile in such a manner as would naturally and probably result in injury to other persons lawfully using said street, and if you further believe from the evidence that the operator of said automobile was conscious, from his knowledge of surrounding circumstances and existing conditions, that his conduct would naturally or probably result in injury to others using said street, then said defendant was operating said car in a willful and wanton manner within the meaning of the law."

The court did not err in giving this instruction.

One of the complaints against appellee's fourth instruction is that it is not based on any charge in the declaration. This point is well taken, and the instruction should have been refused. This instruction is based on a violation of a statute which was not made the basis of any charge of negligence in any count of the declaration. McCrotty v. M. & O. S. W. R. Co., 223 App. 390-392; Chicago City Ry Co. v. Bruley, 215 Ill. 464-465; C. & M. I. A. R. Col v. Driscoll, 176 Ill. 330-336; I. C. R. R. Co. v. Godfrey, 71 Ill. 500-510; I. C. R. R. Co. v. McKee, 43 Ill. 119-132; Horn v. Beard, 210 App. 238-240.

Instruction six has to do with the measure of damages, and includes the following: "And if you further find from the evidence that the plaintiff will in the future, as a result of such injuries, if any, undergo mental suffering by reason of physical disfigurement as a result of such injuries, then you may compensate him for such mental suffering as the evidence shows he will sustain by reason of such disfigurement."

Mental suffering, disconnected with bodily pain and arising from the contemplation of disfigurement, is not a proper element

of damages. Chicago City Railway Co. v. Anderson, 182 Ill. 298-300; Fitzgerald v. Levin, [illegible] App. [illegible]; Chicago City R. Co. v. Taylor, 170 Ill. 49-58; Joch v. Dankwardt, 85 Ill. 351-352; I. & St. L. R. Co. v. Stables, 62 Ill. 313-321. In Chicago City Ry Co. v. Anderson, supra, the court at page 300 in discussing this question says:

"The mental pain that comes from the contemplation of a maimed body, and the humiliation of going through life in a crippled condition, is too remote to be considered an element of damage. The mental pain that may be considered and allowed for in this class of cases is such as is the direct result or concomitant of the physical pain suffered. Mental pain is always an attendant upon severe physical pain,--such is the relation of mind and body,--and the mental pain that is the direct and necessary result of the physical pain, but not otherwise, is a proper element of damages in personal injury cases." Citing Chicago City Ry Co. v. Canevin, 72 App. 81. The Court erred in giving this instruction.

Appellee's eighth instruction is as follows:

"The Court instructs the jury that if you find from a preponderance of the evidence that the plaintiff was injured by the willful and wanton misconduct of the defendants, as charged in the second count of said declaration, then the plaintiff is entitled to recover, irrespective of whether or not he himself was in the exercise of reasonable care for his own safety."

Appellants contend that this instruction is erroneous in submitting to the jury the question of willful and wanton misconduct. We have already discussed this phase of the case. Appellants are not in a position to raise this question at this time. However, we are of the opinion and hold that this instruction should not have been given as its effect is to assume that appellants were guilty of willful and wanton misconduct, instead of submitting that question to the jury on the evidence.

It is also contended that the court erred in refusing the following instruction offered by appellants:

"You are instructed there is no evidence in this case that the driver of the defendants' truck acted willfully, wantonly or recklessly, as charged in the second count of the declaration, and that count is not to be considered by you in making up your verdict."

Counsel insist that there is no sufficient evidence on which to base a verdict of willful and wanton misconduct. In addition to the testimony of appellee that appellants' truck was going fast, the driver of the truck stated there was no traffic on Seventh Avenue near where the collision occurred; that he saw appellee about thirty-five feet from him; "the party-(appellee) had his head down, didn't take notice of me coming, so I tried to cut in to the left, I didn't toot the horn. I didn't call to this man. I didn't give any signal or make any outcry. I tried to miss him." There was also a conflict in the evidence as to where appellants' truck was stopped immediately after the accident. Three witnesses for appellee and one for appellants testified that it was standing on Seventh Avenue opposite to or some feet west of the west line of Thirty-fourth street. One witness for appellants stated that it was standing ten to twelve feet east of the east curb of Thirty-fourth Street with the motor running. The collision took place some thirty or thirty-five feet east of the east line of Thirty-fourth Street. Appellants' driver further testified "After the collision the car had went dead and I left it sew right where the collision happened. * * * When I got back * * * my truck was standing at the same place the accident happened."

Without expressing any opinion on the weight of the evidence we hold that the court did not err in refusing this instruction.

It is next contended that the verdict is excessive. While the verdict is large, the injury to appellee was serious and of a permanent nature. The physician who treated appellee testified that he suffered a compound comminuted depressed fracture of the

frontal bone of the skull, three and a half or four inches long and an inch and a half wide, the skin broken, the skull crushed and pressed in on the brain; a deep cut on the throat, from two to three inches long, severing the four cartilages of the windpipe and all of its muscular coverings; an extreme dislocation of the left hip joint, a continuity fracture of the left kneecap, and numerous cuts and bruises over the body, extending from the foot to the head; that appellee was unconscious from five to seven days; that the injury to the skull caused a meningitis which continued some three or four weeks, and the wound in the skull did not heal until about May 1st, 1920; that there is a permanent depression in the skull due to the absence of the bone which was crushed and removed; that this hole is covered with cartilagenous substance and that the bone will never be replaced. Appellants in their argument state that appellee's actual monetary loss for doctor and hospital bills, damage to bicycle and clothing and loss of ten months' time at work was in the neighborhood of $3,000.

We are not able to say that the verdict is so excessive that it evidences that the jury were governed by prejudice and passion. This being the state of the record, we would not be warranted in reversing the judgment on account of the size of the verdict. Commonwealth Electric Co. v. Rooney, 138 App. 275-297; Bochat v. Knisely, 144 App. 551-564.

For the reasons above set forth, the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and Remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

_____
Clerk of the Appellate Court

(53761—3M—7-27)

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-seven, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JAN 10 1928 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 7840 Agenda No. 27

In The

APPELLATE COURT OF ILLINOIS.

Second District

October Term, A. D. 1927.

PETER O. BENSON, Appellee,	)	
vs.	)	Appeal from Circuit Court
ALBERT JOHNSON, Appellant.	)	DeKalb County, Illinois

OPINION by BOGGS, J.

An action in assumpsit was instituted by appellee against appellant in the circuit court of DeKalb County, at the June Term, 1927, to recover for services alleged to have been performed by appellee as a farm laborer for appellant. The declaration consisted of the common counts, supported by affidavit of merits. To said declaration appellant filed a plea of the general issue, with notice of special defenses and an affidavit of merits, stating that after deducting amounts owing to appellant, there was due appellee $325.12. A trial was had, resulting in a verdict and judgment in favor of appellee for $649. To reverse said judgment, this appeal is prosecuted.

The principal ground relied on for a reversal of said judgment is that the verdict of the jury is against the manifest weight of the evidence.

Appellee, the only witness on his own behalf, testified that he worked for appellant as a farm laborer from March 15th to August 2nd, 1925, at an agreed wage of $70. per month; that he

returned to work for appellant on November 23rd, and worked to April 5, 1926, when he laid off to go to see a sick brother; that he again worked for appellant from April 26 to July 19, 1926; that appellant had paid him in the aggregate $170.00.

Appellant testified that appellee worked for him from March 31 to July 18, 1925, at $70. per month; that "that was the end of his hiring. * * * He came out on the 23rd of November and was going to husk corn for me," that he only husked half a day, when his back gave out; that he afterward attempted to husk corn and his back gave out again. He further testified: "He stayed around there. * * * I think in December I told him 'I intend to pay you for whatever you do, Pete.' * * * He stayed there from November 23rd until the 2nd of April 1926."

Appellant further testified that a reasonable wage for appellee from November 23rd until April 2nd, 1926 "would be board and room and wash, but I was willing to pay him $30. a month. He again started to work, April 26, 1926, and worked until the night of July 20th; I had no agreement with him for wages for this period of time. * * * his services for that period would be worth $60. a month, which I am willing to pay." He further testified that he did some hauling for appellee with his tractor and team, and that the reasonable price therefore was $25.; that he boarded appellee while he was sick, for which he charged him $15. He further testified that appellee did not work during the winter months, except to help him with the milking and doing of the chores, while appellee testified that he fed some twenty-five cows and milked from five to eight cows each morning and evening, as a part of his work.

James Carter, a witness on behalf of appellant, testified that during the winter, from November 23, 1925 to April 2, 1926, a reasonable wage for a man working on the farm, was about $35.00 to $40.00 per month.

The evidence was conflicting, the testimony of appellee being to the effect that he worked practically all of the time while in the employ of appellant, and that he had given credit for any days that he did not work. On the other hand, appellant testified that during the winter months appellee did not work continuously, and that he was sick considerable of the time. There was also a conflict as to the length of time appellee worked for appellant, and also as to whether appellee was indebted to appellant, as claimed by him.

No complaint is made as to the rulings of the court on the evidence, and no instructions were tendered by either of the parties. The question of the weight and credibility of the testimony of the witnesses was for the jury, and unless we are able to say that the verdict is against the manifest weight of the evidence, we would not be justified in reversing said cause on the ground that the verdict is against the weight of the evidence. Village of Wilmette v. Brachle, 110 App. 356-361; affd. in 209 Ill. 261; Anderson v. Tobey, 116 App. 535-540; Baldwin & Co. v. Alwing, 109 App. 92.

Appellant contends that, except as to the first period, there was no agreement as to the wage appellee was to receive, and that therefore appellee was required to prove by a preponderance of the evidence the reasonable value of his services. No instructions were tendered by appellant advising the jury with reference to the law in regard to such employment. Therefore, if the verdict can be sustained on any reasonable theory of the evidence in the record, appellant is not in a position to complain. The theory of appellee is that his employment, for whatever time he worked, was at $70. per month. If the jury adopted that theory and believed appellee's testimony as to the time he worked, there is evidence in the record to sustain the verdict.

What we have already said sufficiently covers the assignment of error that the verdict is excessive.

It is also contended by counsel for appellant that the judgment is erroneous, for the reason that no replication was filed to his plea.

As heretofore stated, the plea was a plea of the general issue. While the affidavit filed by appellant was somewhat in the nature of a plea of set-off, it was not in fact such plea, and did not purport to be. The document in question begins as follows: "The plaintiff in the above-entitled cause will take notice that, on the trial of this cause, under the general issue above pleaded, the defendant will give in evidence and insist." etc. Neither does it conclude with a verification, or to the country. It was therefore not a plea to be replied to. As to the plea of the general issue, the defendant by proceeding to trial on the declaration and plea, waived the filing of a similiter.

It is also contended that appellee was not entitled to recover on the common counts. The record discloses that appellee had performed his part of the contract; in other words, it was executed on the part of appellee. He was therefore entitled to recover under the common counts. Foster v. McKeown, 192 Ill. 539-545; Chicago Warehouse & Silo Fixture Co. v. [illegible] Planing Mill and Lumber Co., 206 App. 408; [illegible] v. Indian [illegible] Drainage District, 217 App. 502-510.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

_____
Clerk of the Appellate Court

(53761—3M—7-27)

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-seven within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

7868.

Term No. 67 Agenda No. 45

In The

APPELLATE COURT OF ILLINOIS

Second District

October Term, A.D. 1927

ANNA M. SHIELDS, Admx. of the Estate of James Shields, deceased, Appellant,	)	Appeal from Woodford County Circuit Court
vs.	)	
ELMER HAIG, Appellee.	)	

OPINION by BOGG, J.

Appellant as administratrix of the estate of James Shields, deceased, took judgment by confession, in vacation during the April term, 1927, of the circuit court of Woodford County, against appellee, for $1,178.67 and costs.

The note on which judgment was confessed bore date January 31st, 1922, was made payable to the First State Bank of Benson, and was signed by appellee and the said James Shields. The declaration avers that said note was signed by Shields as an indorser, "and the said Elmer Haig having refused and failed to pay, the same was afterwards paid by the said James Shields"; that the said bank, "on the same day and year and at the place aforesaid, indorsed the said note in writing, by which said indorsement the First State Bank of Benson then and there ordered and appointed the said sum of money in the said note mentioned to be paid to the said James Shields, and then and there delivered the said note, so indorsed, to the said James Shields." Said

declaration avers the death of Shields and the appointment of appellee as administratrix, etc.

On June 20, 1927, being one of the days of said term, a motion was made by appellee to vacate and set aside said judgment. On July 11, 1927, the court allowed said motion, and entered an order vacating said judgment. To reverse said order, appellant prosecutes this appeal.

It is contended by appellee that the abstract is not sufficient to present for the consideration of this court the questions raised by the assignment of errors.

One of the grounds urged by appellee against the sufficiency of said abstract is that it does not state that it contains all of the evidence heard by the court on the motion to vacate.

This point is not vital to the decision of this case, for the reason that where a judgment by confession is entered by a clerk in vacation, the note and warrant of attorney as well as all affidavits and other papers filed at time of entry of such judgment became part of the record without a bill of exceptions. Durham v. Brown, 24 Ill. 93-94; Roundy v. Hunt, 24 Ill. 598-601; Waterman v. Caton, 55 Ill. 94; Stein et al v. Good, 115 Ill. 95-96; Matzenbaugh v. Doyle, 156 Ill. 331-334; Schmidt v. Bauer, 33 App. 93.

The note in question contains a warrant of attorney, authorizing any attorney at law to waive service, etc., and confess judgment "on this note in favor of the payee or holder thereof; * * * to agree that no writ of error nor appeal shall be prosecuted on such judgment, nor any bill in equity exhibited to interfere therewith; to release all errors in the entering of such judgment, etc.

The note was signed by appellee and the said James Shields on the face, where ordinarily signed by makers, and the

administration avers the death of [illegible] and the appointment of appellee as administratrix, etc.

On June 30, 1927, being one of the days of said term, a motion was made by appellee to vacate and set aside said judgment. On July 11, 1927, the court allowed said motion, and entered an order vacating said judgment. To reverse said order, appellant prosecutes this appeal.

It is contended by appellee that the abstract is not sufficient to present for the consideration of this court the questions raised by the assignment of errors.

One of the grounds urged by appellee against the sufficiency of said abstract is that it does not [illegible] contain all of the pleadings [illegible] record.

This point is not vital to the decision of this case, for the reason that where a judgment by confession is entered [illegible] in vacation, the note and warrant of attorney [illegible] all affidavits and other papers filed at time of entry of such judgment become part of the record [illegible]. [illegible] v. [illegible], [illegible] Ill. [illegible]; [illegible] v. [illegible], [illegible] Ill. [illegible]; Ackerman v. Caton, 55 Ill. 94; Stein et al v. Good, 115 Ill. 93-[illegible]; [illegible] v. [illegible], [illegible] Ill. [illegible]; [illegible] v. [illegible], [illegible] Ill.

The note in question contains a warrant of attorney, [illegible] etc.

The main [illegible] by appellee [illegible]

power of attorney provides "all signers to this are principals. No extension of time of payment, with or without our knowledge, by the receipt of interest or otherwise, shall release us, or either of us, from any obligation under this note."

Counsel for appellant practically concedes that the note in question does not show any indorsement, and that none of the papers filed with the clerk at the time said judgment was entered tend to show any indorsement, but insists that inasmuch as the declaration avers an indorsement, and the cognovit confesses judgment and releases errors, that appellee is bound thereby, and cannot take advantage of the fact that the note does not conform to the averments of the declaration.

The entry of a judgment by confession by a clerk of a court in vacation is a ministerial act. Durham v. Brown, supra; Matzenbaugh v. Doyle, supra, 333; King v. King & Co., 91 Ill. 571-573; Hutson v. Wood, 263 Ill. 376-385. The judgment by confession having been entered by the clerk in vacation, the papers filed at the time of the entry of such judgment should disclose on their face authority to the clerk to enter the same.

In Matzenbaugh v. Doyle, supra, the note on which judgment was confessed, on its face, appeared to be barred by limitation. The court at page 334 says:

"The plaintiff, upon the hearing of the motion, offered to show by affidavit that several payments had in fact been made by the defendant on the note, and that the last payment was made within less than ten years prior to the entry of the judgment. This offer was rejected by the court, and the defendant's motion to vacate the judgment was thereupon sustained. That order, on appeal to the Appellate Court, was affirmed, and this appeal is from the judgment of affirmance.

"It appears that at the time the judgment was entered no indorsements of any payments had been made on the note, and that no

proofs was then offered that the note, by partial payments or otherwise, had been taken out of the operation of the Statute of Limitations. At that time the note had been overdue more than ten years, and, so far as was then made to appear by the papers filed with the clerk, it was barred by limitation. * * *

"In cases of this character the authority of the attorney to execute the cognovit and of the clerk to enter up judgment in pursuance thereof, should fully and clearly appear from the papers filed upon the application for judgment. Those papers, together with the judgment, constitute the record, and, like other records, it must be tried by itself, and its validity cannot be made to depend upon evidence aliunde. The entry of judgment having been made in vacation before the clerk,--a more ministerial officer,--it will be aided by none of those presumptions which prevail where judgments are entered in open court, and hence no presumptions will be indulged in that evidence was presented or heard other than that appearing in the record. If, then, the authority of the attorney to execute the cognovit was not shown at the time the judgment was entered, the clerk was without authority to enter up the judgment, and such entry was improvidently made."

At page 337, the court in discussing this question further, says:

"The rule that a defendant, to avail himself of the defense of the Statute of Limitations, must plead the statute, which the plaintiff now seeks to invoke, can have no application here, since, as the entry of the judgment by confession was purely ex parte, no opportunity was afforded the defendant to set up such defense by plea. It became incumbent upon the plaintiff, therefore, to show affirmatively that his debt, which appeared to be more than ten years overdue, was in some way taken out of the operation of the statute, without such plea on the part of the

defendant. As he failed to do so, the inference against him must be deemed to be conclusive."

In this case the papers filed with the clerk wholly fail to warrant an entry of judgment against appellee, as said note on its face purports to be signed by appellee and by appellant's intestate as the makers thereof. Said note bears no indorsement whatever but by its terms is payable to the First State Bank of Benson. The errors disclosed by the record are not of the character which appellee undertook to waive, but went to the jurisdiction of the clerk to enter said judgment. On the face of the papers filed instead of showing that he had such authority, they clearly disclose the want of the same.

Counsel for appellant further insists that the mere possession of said note although not payable to his order and not indorsed by the payee is in and of itself evidence of ownership, and that, that being true, under the averments of the declaration, the motion should have been denied. This point is not well taken.

In Collins v. Ogden, 323 Ill. 594, the court in discussing a question of this character at page 599 says:

"The burden of proof was therefore on the defendant in error to prove the execution of the indorsement by Wade. On this issue he introduced no evidence whatever, other than the paper itself, and he argues that the possession of the note is prima facie evidence of the legal title to the instrument. In Burnap v. Cook, 32 Ill. 168, it is said that this court has repeatedly held, and the doctrine has been uniformly maintained and generally acquiesced in for such a length of time that it should not now be disturbed, that the party having the legal title to a promissory note must sue in his own name, citing McHenry v. Ridgely, [illegible] com. 309, and Campbell v. Humphries, id. 478."

In further discussion of this question, the court comments on the case of Martin v. Martin, 174 Ill. 371, and, at page 604 says:

"It must be regarded as the settled law in this State that while an equitable interest in negotiable instruments payable to order may be acquired either by gift or contract without indorsement by the payee, the mere possession of negotiable securities payable to order and not indorsed by the payee, or, if indorsed specially, not indorsed by the special indorsee, is not alone evidence of title, either legal or equitable, in the possessor, but the burden of proof is on the possessor to prove his equitable title by showing a delivery to him with the intent to pass the title."

There being no indorsement on the note in this case and no proof of its delivery to appellant or to her intestate, with the intention of passing the title, thereto the clerk was not warranted in entering up judgment thereon.

Appellant's intestate was a principal on said note and power of attorney which provided that no extension of time of payment, should release the makers of said note from their obligation thereon. Certainly no one would insist that one of two principals on a judgment note would have the right to pay the note, and, without indorsement to him or otherwise, confess judgment thereon against the other maker.

In Beauman v. Simmons, 213 App. 482, the court, in discussing a question where a note had been paid by one of the makers, at page 484 says:

"It can make no difference whether this note was paid by Simmons or by the other joint maker, Carter. If Carter paid it, he would then have no right to transfer the note to appellee so that appellee might take judgment upon it. His rights would be to institute suit against appellant for the money paid out by him for appellant's use. * * * The power of attorney authorized a confession of judgment in favor of the legal holder of the note only. Appellee was not the legal holder, the legal title was still in Gray and had never been transferred by him."

The legal title to the note in question is in the First State Bank of Benson, and there was no authority to confess a judgment in favor of anyone else thereon. The power to confess a judgment must be clearly given and strictly pursued, and a departure from the authority conferred will render the confession void. Keen v. Bump, 286 Ill. 11-14, citing Chase v. Dana, 44 Ill. 262; Tucker v. Gill, 61 Ill. 236; Frye v. Jones, 78 Ill. 627; Whitney v. Bohlen, 158 Ill. 571. In Keen v. Bump, supra, the court at page 14 says:

"The warrant was to confess judgment in favor of the payee of the note, the Farmers National Bank of Allendale, and the confession was in favor of the Farmers and Merchants National Bank of Allendale, which was unauthorized."

Where the judgment is void, the same will be vacated on motion, irrespective of whether or not there is a meritorious defense. The fact that the cognovit contains a release of errors and an agreement that no appeal or writ of error shall be prosecuted or bill in equity filed to interfere with the judgment, does not prevent the court from vacating and setting aside the judgment, or holding it void. Desnoyers Shoe Co. v. First Bank, 188 Ill. 312-319; Hutson v. Wood, 263 Ill. 376-384.

We therefore hold that the court did not err in vacating and setting aside said judgment.

For the reasons above set forth, the judgment of the trial court will be affirmed.

Judgment affirmed.

[illegible]

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and twenty-_____

_____

Clerk of the Appellate Court

(53761—3M—7-27)

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-seven, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

IN THE MATTER OF THE ESTATE OF MARK ALLEN, Deceased,

Appellant.

Appeal from the Circuit Court of Knox County.

Jett, P. J.

Emma Tolley, appellee, filed a claim against the estate of Mark Allen, deceased, in the Circuit Court of Knox County on the 23rd day of January 1925 for work and labor performed in and about the care of Mrs. Mary Wade, mother-in-law of Mark Allen, at his request from June 1915 to February 1917 amounting to $2500.

Two trials before a jury have been had. The first resulted in a verdict for Emma Tolley, claimant, in the sum of $1400. The court set aside the verdict and on the second trial a verdict was rendered in favor of said claimant for the sum of $2500. Judgment was rendered thereon and this appeal followed.

It appears that Mark Allen was a carpenter and a hard working man. He became the owner of certain residence property by reason of this labor and thrift. The testimony discloses that he paid for it in small amounts and at different times, dealing largely with building and loan associations. The family of Mark Allen consisted of himself, his wife and his mother-in-law. A good part of the time a brother-in-law also resided with them.

In December 1914 the wife of Mark Allen died. He obtained a house-keeper by the name of Mrs. Smith who looked after his mother-in-law and attended to the household duties. Mrs. Smith worked for Allen from February 1915 until in December 1916 at which time she ended her employment.

The evidence tends to show that at a certain party at the home of the claimant the decedent requested her to look after his mother-in-law and see that she had plenty to eat, etc. The evidence shows that the claimant rendered much service after the time the decedent asked her to look after his mother-in-law until her physical condition became

Appeal from the
Circuit Court of
Knox County.

Opinion.

Mr. Justice Carter delivered the opinion of the court:

Jane Tolley, appellee, filed a claim against the estate of Mark Allen, deceased, in the Circuit Court of Knox County on the 22nd day of January 1921 for work and labor performed in and about the house of Mrs. Mary Wade, mother-in-law of Mr. Allen, at his request from June 1913 to February 1917 amounting to $2000.

Two trials before a jury have been had. The first resulted in a verdict for Jane Tolley, claimant, in the sum of $1400. The court set aside the verdict and on the second trial a verdict in favor of said claimant for the sum of $2000. Judgment was rendered thereon and this appeal followed.

It appears that Mark Allen was a bachelor and a hard working man. He became the owner of certain farming property in Knox County by inheritance from his father and mother. The testimony discloses that he paid for it in small amounts and at different times. Jennie Lampel, wife of William Lampel, appellee herein, testified that Mark Allen consulted of himself, his wife and his mother-in-law. I quote that of the time of the purchase of the property, also testified with them.

In December 1914 the wife of Mark Allen died. He obtained a housekeeper by the name of Mrs. Smith who looked after his mother-in-law and attended to the household duties. Mrs. Smith worked for Allen from February 1915 until in December 1916 at which time the social relations ceased.

The evidence tends to show that at a certain party at the home of the claimant the deceased requested her to look after his mother-in-law and see that she had plenty to eat, etc. The evidence shows that the claimant rendered such service after the time the deceased asked her to look after his mother-in-law until the parties separated.

such that she was unable to be cared for at home and was removed to a hospital and finally to a county home where she died.

The evidence shows that Mark Allen in the meantime had gone to Michigan where he had obtained employment. He died in 1924. His only heir at law was a brother who resided in Texas and who, upon his hearing of his brothers death, telegraphed a firm of undertakers in Galesburg, where the decedent had been living prior to going to Michigan, and asked the firm to look after the brothers burial.

The claimant afterwards filed her claim for services as hereinbefore indicated. She made proof of the contract between her and the decedent and of matters necessary to remove the bar of the statute of limitations and in fact all other things which were thought to be necessary in support of her claim.

The testimony on the part of the claimant was contradicted by a number of witnesses and by undisputed facts and circumstances. There is no evidence showing that Emma Tolley, the claimant, ever presented a bill to Mark Allen for work, services and labor performed during his lifetime and nothing was ever claimed by her for such services until after his death. The evidence shows that in 1918 the claimant together with her husband and her family moved into the house of Mark Allen in Galesburg, Illinois, at an agreed rental of $11.00 per month. The claimant and her husband and family lived in the decedents house until the death of the husband of the claimant which occurred in 1920, and the claimant and her children continued to reside in said house until January 1925, when they were dispossessed and compelled to remove from said premisses. The record further disclosses that the claimant did not pay any rent on said premises after August 4, 1921, and that she was indebted to Mark Allen for rent on said premises from August 4, 1921 to January 1925 at $11.00 per month.

According to a letter written by Emma Tolley, the claimant, to Mark Allen in Detroit, of date June 15th, 1920, she stated that she would do her best to keep up her rent although she was left with four little ones and no income and that she did not know whether or not she

would get a widows pension.

J. P. Foley, a member of a firm of undertakers, testified that in a day or so after the death of Mark Allen he went to the home of the claimant to see her and ascertain whether or not Mark Allen had anything in order to justify them in looking after the burial and funeral and during this conversation Emma Tolley told Foley that Mark Allen owned the property in which she resided and that she was behind on her rent.

The basis on which the claimant justifies her claim is that it was necessary for extra care and attention to be given Mrs. Wade on account of the involuntary condition of her kidneys and bowels and that the washings she claims to have done were rendered necessary on that account. The testimony of Mrs. Jones, now Mrs. Smith, Dr. Haley, Mrs. Lawrence, Doris Anderson and Dr. C. E. Quaife establishes the fact that Mrs. Wade was not subject to involuntary action of her kidneys and bowels during 1915 and 1916 and until June 1917.

We are of the opinion that the verdict of the jury is against the manifest weight of the evidence. The conduct of the claimant is entirely out of keeping with her statement to the undertaker; also with her letter of date June 15th, 1920. It is inconceivable that under the circumstances in which she found herself claimant would permit a claim to run as long as she did without making any demand for a settlement or without getting any written evidence of the contract.

The instructions are not very skillfully drawn but after an examination of them we are not prepared to say that the giving of instructions on the part of appellant or the refusing of instructions offered by appellee constitute reversible error.

would get a widows pension.

J. F. Foley, a member of a firm of waterboxers, testified that in a day or so after the death of Mark Allen he went to the home of the claimant to see her and ascertain whether or not Mark Allen had anything in order to justify them in looking after the burial and funeral and during this conversation Mrs Hollow told Foley that Mark Allen owned the property in which she resided and that she was looking to him for it.

The basis on which the claimant justifies her claim is that it was necessary for extra care and attention to be given Mrs. Wade on account of the involuntary condition of her kidneys and bowels and that the weanings she claims to have done were rendered necessary on that account. The testimony of Mrs. Jones, now Mrs. [illegible], [illegible] establishes the fact that Mrs. Wade was not subject to involuntary action of her kidneys and bowels during 1915 and 1916 and until June 1917.

We are of the opinion that the verdict of the jury is against the manifest weight of the evidence. The conduct of the claimant in entirely out of keeping with her statements to the undertaker; also with her letter of date June 15th, 1916. It is inconceivable that under the circumstances in which she found herself claimant would permit a claim to run as long as she did without making any demand for a settlement or without getting any written evidence of the contract.

The instructions are not very skillfully drawn but after an examination of them we are not prepared to say that the giving of them constitutes on the part of a litigant or the refusing of instructions offered by appellee constitute reversible error.

In view of the state of the record we are of the opinion the court erred in rendering judgment on the verdict.

The judgment of the Circuit Court of Knox County will therefore be reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

_____

Clerk of the Appellate Court

(53761—3M—7-27)

abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-seven, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JAN 28 1928 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

STANDARD OIL COMPANY OF
INDIANA, a Corporation,

Appellant,

-vs-

WALTER A. HITZ,

Appellee.

Appeal from the
Circuit Court of
Iroquois County.

Jett, P. J.

Standard Oil Company, of Indiana, a corporation, appellant, brought suit against Walter A. Hitz, appellee, to recover the sum of $1849.29 which appellant claimed due it from appellee, a former employee, as a result of his alleged manipulations of tickets, appropriation of moneys belonging to his employer, and the alleged tapping of a gasoline tank of appellant allowing approximately 2,000 gallons of gasoline to escape and be wasted under the guise of a robbery of said tank and for the alleged purpose of concealing his alleged shortages, manipulations and defalcations. A jury trial was had which resulted in a finding in favor of appellee andthis appeal followed by the appellant.

The declaration consists of the common counts and three special counts. The firstspecial count charges in detail, among other things, that appellee had been in the employ of appellant and in charge of its gasoline station at Cissna Park, in Iroquois County; that there was due to appellant $1849.29 and that it arose as a result of appellee's alleged manipulation of tickets, appropriation of money's belonging to his employer and deliberate tapping of a gasoline tank and allowing approximately 2,000 gallons of gasoline to escape under the guise of a robbery of the said tank and for the alleged purpose of damaging and defrauding the appellant. The second special count is of a similar character. The third special count sets

appellant.

-12-

Appeal from the

Circuit Court of

Lawrence County.

Hon. J. E.

Dismissed and remanded, at costs, a certificate, accordingly.

Brought suit against Miller in 1911, upon the 1st day of [illegible] which appellant claimed due it from appellee, a former employee, as a result of his alleged manipulations of tickets, appropriation of money belonging to the company, and the alleged taking of a gasoline tank of appellant (illegible) gallons of gasoline of the value of $ [illegible] and for the alleged [illegible] of said tank and for the alleged [illegible] shortages, manipulations and defalcations. A jury trial was had which resulted in a finding in favor of [illegible] and in [illegible] by the appellant.

The declaration consists of the common counts and three special counts. The first special count charges in detail, among other things, that appellee has been in the employ of appellant and in charge of its gasoline station at Olney Park, in Ingersoll County; that there was due to appellant $1849.29 and that it arose as a result of appellee's alleged manipulation of tickets, appropriation of money's belonging to his employer and deliberate tapping of a gasoline tank and allowing approximately 2,000 gallons of gasoline to escape under the guise of a robbery of the said tank and for the alleged purpose of damaging and defrauding the appellant. The second special count is of a similar character. The third special count sets

forth the employment of appellee by appellant, avers the wasting and destruction of said gasoline and then charges that on September 13, 1924, appellee in writing admitted he owed to and was indebted to appellant the sum of $2052.87, and thereupon agreed and promised in writing to pay to the appellant said sum.

To the declaration appellee filed five pleas. The third, fourth and fifth pleas were subsequently amended and as amended the pleas were as follows:- The first plea pleaded was the general issue; the second, want of consideration; the third amended plea was a plea of nul tiel corporation; the amended fourth and fifth pleas were pleas in confession and avoidance of matters averred in the third special count of appellant's declaration and were to the effect that the alleged agreement or statement signed by appellee in which a certain amount was stated to be owing appellant and setting forth the wrongful accounts of appellee were obtained by duress. The second, fourth and fifth pleas concluded with a verification. Replications were filed to the affirmative pleas, the trial resulting as aforesaid.

It is contended by the appellant for a reversal of the judgment that the court erred in refusing the motion made by appellant at the close of appellee's evidence and again at the close of all of the evidence to exclude the same and direct a verdict in favor of appellant. In view of the conclusions we have reached it is unnecessary to enter upon any discussion of the action of the court denying the respective motions.

It is next insisted by the appellant that the verdict of the jury is against the manifest weight of the evidence. In addition to the statement admitting liability and confessing to have staged a robbery of the gasoline station signed by appellee the testimony of the witness Pyles, Lindenfelser and Mantling, witnesses on behalf of appellant all tend to prove the averments of appellant's declaration.

The record further discloses that on a prior occasion and during a period of former employment of appellee by appellant appellee had been charged with having been guilty of irregularities in the conduct of the business of said gasoline station and that he became indebted to appellant in the sum of $380.00 and that appellee admitted such irregularities and signed a statement to that effect and afterwards paid the amount thereof to appellant. It was not contended by appellee, at that time, that he signed the statement under any fear or compulsion.

The evidence tends to prove that the reports made by appellee to the appellant with reference to deposits being made by him to the credit of appellant were not true. The evidence shows conclusively that appellee had from $400. to $700. of appellant's money which he was carrying around in his pockets for a number of days which should have been deposited to the credit of appellant.

Without going into a detailed discussion of the evidence in support of appellant's case we are of the opinion it sufficiently proved appellant's cause unless the evidence and proof in support of appellee's second, fourth and fifth affirmative pleas is sufficient to show a want of a consideration, or that the statement in question signed by appellee was obtained by duress. The evidence that it was so obtained rests upon the testimony of appellee. This testimony was disputed by the three witnesses above named.

In view of the state of the record it was important that the instructions to the jury should be substantially correct as defining the law of the case. The seventh and eighth instructions given on the part of appellee deal with the question of the burden of proof. They are as follows:

Seventh. "The jury are instructed that the plaintiff is required by law to establish its case by a preponderance of the evidence before it can recover. If the plaintiff in this suit has not so established its case, or if the evidence is evenly balanced so that the jury are in doubt and unable to say upon which side the preponderance is, or if the preponderance of the evidence is in favor of the defendant, then in either of these cases the verdict should be for the defendant."

Eighth. "The court instructs the jury that the burden is not upon the defendant to show that he was not guilty of the specific negligence charged in this case but the burden is upon the plaintiff to show that the defendant was guilty of negligence in the loss or destruction of the property, gas and oil in question, or that he wilfully destroyed the said gasoline, and the court instructs you that before the plaintiff can recover in this case on account of its claim for damages to its property or the loss or destruction of the gas and oil claimed to have been lost or destroyed through the negligence or wilful conduct of the defendant Hitz the plaintiff must establish by a preponderance or greater weight of the evidence that the property of the plaintiff was damaged or the gas and oil in question was lost or destroyed through the negligence or wilful act of the defendant Hitz."

It will be remembered that the declaration in this cause consists of the common counts and three special counts, the special counts declaring upon the various phrases of the contract of employment and the breach by appellee with the resulting damage to appellant and one of which charges appellee as accounting with appellant by his agreement in writing to pay $2052.87.

It must also be kept in mind that appellee's defense on the trial was based upon the general issue and several special pleas which are designated as follows: The second special plea is want of consideration; the third plea is nul tiel corporation; the amended fourth plea admits the accounting and agreement in writing to pay appellant but seeks to avoid by charging duress, imprisonment by appellant by appellant, that false and malicious charges of embezzlement were made against appellee and that appellee had maliciously, unlawfully and mischievously destroyed and wasted large quantities of gasoline, and that appellee was

so kept in prison and because of such threats and fears and for no other reason he did sign such paper and agreement. The amended fifth plea admits signing the confession and agreement in writing to pay the sum due appellant and then seeks to avoid the same by stating in effect the same reasons as stated in the fourth amended special plea.

The affirmative issues in this cause as stated in the declaration are not the controlling facts in deciding the case. Under plaintiff's declaration the issues were by the evidence maintained, the appellee's agreement in writing to pay being admitted in evidence. This was a case for appellant as it was within the declaration and was established by a preponderance of the evidence. The burden of proof was then upon the appellee to sustain his plea of failure of consideration and his fourth and fifth pleas by a preponderance of the evidence. The seventh instruction complained of is not only misleading but it is vicious in directing the jury that the appellee is required to do no such thing upon the really controverted questions in the case, namely: was there duress in obtaining the confession and the instrument admitted in evidence and was there a failure of consideration? This instruction tells the jury that the plaintiff must establish its case before it can recover and if the plaintiff has not established its case by a preponderance of the evidence the jury should find for the defendant. The court failed to tell the jury what is the preponderance of the evidence or how it can be established. We are of the opinion that the seventh instruction was, under the facts in this proceeding, erroneous.

By the eighth instruction given on the part of appellee the jury is in substance told that the burden is not upon appellee to show that he was not guilty of the specific act of negligence charged, but the burden was upon the appellant to show that appellee was guilty of negligence in the loss or destruction of the property, the gas and oil in question, or that the appellee wilfully destroyed the same, and the

court further instructed the jury before the plaintiff could recover on account of its claim for damages to its property or the loss or destruction of the gas and oil claimed to have been lost by appellee "the plaintiff must establish by a preponderance or greater weight of the evidence that the property of the plaintiff was damaged or the gas and oil in question was lost or destroyed through the wilful act or negligence of the defendant Hitz."

It will be remembered that under the third count of the declaration no negligence or wilful act is charged for the allegations are that the appellant and appellee entered into a contract of employment whereby appellee took charge of Cissna Park station; that appellee should receive a certain sum for his services and would account to appellant for merchandise committed to his care; that the contract of employment terminated and thereupon it was determined that appellee had negligently and wilfully lost, destroyed and wasted certain gas, oil and merchandise of appellant; that the appellee gave to the appellant a promise in writing to pay $2052.87 whereby it brought its suit. Furthermore the eighth instruction tells the jury that as regards the entire declaration or any count thereof the appellant had the burden of proof even as to disproving the affirmative allegations of appellee's amended fourth and fifth pleas as well as its second plea. In our opinion the giving of this instruction was erroneous.

Appellant also complains of the refusal by the court to give its first, second, fourth, fifth and sixth refused instructions. Appellants first and fifth refused instructions so far as they state correct principles of law are covered by other instructions given on behalf of appellant. The second and sixth instructions are abstract in form and the court did not err in refusing to give themespecially in view of the other instructions given on behalf of appellant. The fourth refused instruction does not in our judgment state any principle applicable to the decision of this cause but simply states that the action was one for the collection of money and not to have appellee imprisoned.

While this was true it was not error in refusing this instruction.

Owing to the state of the record we think the court committed reversible error in the giving of the seventh and eighth instructions given on the part of appellee.

The judgment of the Circuit Court of Iroquois County is reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

_____

Clerk of the Appellate Court

(53761—3M—7-27)

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-seven, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JAN 2 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 7774 Agenda No. 43.

APRIL TERM 1927.

In the Matter of the Estate of FRANK McARDLE, Deceased. Objections to the final report of KATE McARDLE, Executrix,	:	
Appellee,	:	Appeal from the Circuit Court of Grundy County.
-vs-	:	
JOHN McARDLE and BERNARD R. McARDLE, Objectors,	:	
Appellants.	:	

Jett, P. J.

This proceeding comes here on an appeal from an order of the Circuit Court of Grundy County sustaining in part and overruling in part objections of John McArdle and Bernard R. McArdle to the final report of Kate McArdle, executrix of the last will and testament of Frank McArdle, deceased. The controversy arises over the failure of the executrix to inventory and account for certain certificates of bank deposits and also a certain crib of corn which the objectors claim belong to the estate of the said decedent. The objections were filed in the County Court to the report of the executrix and the objections were by that court overruled and an appeal was prosecuted to the Circuit Court of Grundy County. Upon a hearing the Circuit Court held that the corn was the property of the estate but that the certificates of deposit were the personal property of the executrix and that she had acquired them during the lifetime of the decedent.

On the appeal to this court by the appellants, the appellee has assigned cross-errors on the record to so much of the decree and order of the Circuit Court as adjudges that the executrix is liable to the estate for the corn in question. Also after the case was submitted in this court it was insisted that the objections did not confer jurisdiction upon the court to try the title to the property in controversy.

ADMIN. DIST. 1327.

In the Matter of the Estate of FRANK MEARDON, Deceased. Objections to the final report of MAYN EATCHOT, executrix.	Appeal from the Circuit Court of
Appellee,	
-vs-	
JOHN MEARDON and RAYMOND E. Objectors,	
Appellants.	

FILED: 1-1-

This proceeding comes here on an appeal from an order of the Circuit Court of Grundy County sustaining in part and overruling in part objections of John Meardon and Raymond E. Meardon to the final report of Mate Meardon, executrix of the last will and testament of Frank Meardon, deceased. The controversy arises over the failure of the executrix to inventory and account for certain certificates of bank deposits and also a savings bank of some value the objectors claim belong to the estate of the said decedent. No objections were filed in the County Court to the report of the executrix and the objections were by that court overruled and an appeal was prosecuted to the Circuit Court of Grundy County. Upon a hearing the Circuit Court held that the corm was the property of the estate but that the certificates of deposit were the personal property of the executrix and that she had acquired them during the lifetime of the decedent.

On the appeal to this court by the appellants, the appellee has assigned cross-errors on the record to so much of the decree and order of the Circuit Court as adjudges that the executrix is liable to the estate for the corm in question. Also after the case was submitted in this court it was learned that the objections did not confer jurisdiction upon the court to try the title to the property in controversy.

The record discloses that on July 20, 1923, Frank McArdle was seized in fee simple of two tracts of land in Grundy County, Illinois, each consisting of eighty acres and that on the said date last above mentioned he conveyed one of the tracts to Kate McArdle, the appellee, by warranty deed and on the same date transferred the other tract to Phil McArdle, a nephew. In each of these tracts the said Frank McArdle reserved the rents, issues and profits during the time of his natural life. On the 7th day of August 1923, Frank McArdle made his last will and testament by which he provided, after the payment of his debts and funeral expenses that his executrix, Kate McArdle, convert his entire estate both real and personal into money and that as soon as that had been accomplished she should divide the amount into six equal shares paying one portion to each of the six children of his deceased brother James McArdle, two of which children are the objectors in this proceeding to the final report of Kate McArdle, executrix.

On January 20, 1925, the executrix filed an inventory setting forth that the estate consisted of some farm implements, an interest in about thirteen hundred bushels of oats, an interest in about three hundred bushels of corn in the crib, twelve tons of timothy hay, two tons of clover hay and five shares of Mazon Farmer's Elevator Company stock and cash on hand amounting to $556.10. On the 30th day of January, 1926, the executrix filed her final report which shows a deficit of $71.94. Objections to this report were filed by John and Bernard R. McArdle, appellants. The objections were sustained by the County Court and an appeal prosecuted to the Circuit Court of Grundy County as above indicated.

On the hearing in the Circuit Court the evidence showed that the executrix had cashed, after the death of the testator, five certificates of deposit issued by the Grundy County National Bank of Morris, Illinois, in favor of the testator. They appeared to have been endorsed by the testator during his lifetime but which the bank

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On January 20, 1929, the executrix filed an inventory setting forth that the estate consisted of some farm implements, an interest in about thirteen hundred bushels of oats, an interest in about three hundred bushels of corn in the crib, twelve tons of timothy hay, two tons of clover hay and five shares of Mason Terrace's Elevator Company stock and cash on hand amounting to $886.10. On the 30th day of January, 1929, the executrix filed her final report which shows a deficit of $71.94. Objections to this report were filed by John and Bernard R. McArdle, as clients. The objections were sustained by the County Court and an appeal prosecuted to the Circuit Court of Grundy County as above indicated.

On the hearing in the Circuit Court the evidence showed that the executrix had counted, after the death of the testator, five certificates of deposit issued by the Grundy County National Bank of Morris, Illinois, in favor of the testator. They appeared to have been endorsed by the testator during his lifetime but which the bank

had cashed without the endorsement of the executrix either in person or in her official capacity. One of the certificates of deposit had been cashed by Phil McArdle, his nephew, to whom eighty acres of land had been deeded but it was admitted on the hearing that the money was received by Kate McArdle the executrix.

Appellee relies upon a purported gift inter vivos of the certificates of deposit and corn in question. In her opening statement she says:

> "The evidence on the part of the executrix is that about a year before his death, and from then on, and not in contemplation of death--for he died as a result of exposure from an accident--that he endorsed and gave to her these certificates of deposit which he had in the bank; she admits the possession of the certificates and the endorsing and cashing of them just the same as she admits getting the land that he deeded to her before he died."

The question before this court for decision on the part of the appellants is whether or not the certificates of deposit should be accounted for as assets of the estate and on the part of the appellee, by reason of the cross-errors assigned whether or not the corn in question was or was not a part of the assets of the estate of the said Frank McArdle, deceased.

It is the contention of the objectors that the proof does not show that there was any delivery of the property in controversy to the executrix by Frank McArdle. It is argued by the appellee that the property belonged to the executrix and that the same was given to her by the decedent. The executrix also insists that she had possession of the certificates in McArdle's lifetime endorsed by him in blank and that it was prima facie evidence that she was the owner of them, and the burden of proof that she had no title was upon appellants.

It is essential to a donation inter vivos, that the gift be absolute and irrevocable, that the giver part with all present and future dominion over the property given, that the gift go into effect at once and not at some future time, that there be a delivery

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Appellee relies upon a purported gift inter vivos of the certificates of deposit and cash in question. In her [illegible] she says:

> "The evidence on the part of the executrix is that about a year before his death, and from them on, and not in contemplation of death--for he died as a result of exposure from an accident--that he endorsed and gave to her these certificates of deposit which he had in the bank; she admits the possession of the certificates and the endorsing and cashing of them just the same as she admits getting the land that he deeded to her before he died."

The question before this court for decision on the part of the appellants is whether or not the certificates of deposit should be accounted for as assets of the estate and on the part of the appellee, by reason of the cross-errors assigned whether or not the [illegible] in question was or was not a part of the assets of the estate of the said Frank McArdle, deceased.

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It is essential to a donation inter vivos, that the gift be absolute and irrevocable, that the giver part with all present and future dominion over the property given, that the gift go into effect at once and not at some future time, that there be a delivery

of the thing given to the donee, that there be such a change of possession as to put it out of the power of the giver to repossess himself of the thing given. Telford vs Patton, 144 Ill. 611, at 620.

The law requires a gift whether direct or in trust shall be established by clear proof and that no uncertainty shall exist either as to the subject or object of the gift. Barnum vs Reed, 136 Ill. 388-398; Kramer vs Habel, 240 Ill. App. 40.

To constitute a valid gift inter vivos, possession and title must pass to and vest in the donee irrevocably. In this respect, alone, a gift causa mortis differs from a gift inter vivos, as in the case of the former it is revocable on the recovery of the donor. Barnum vs Reed, supra.

The burden was upon the executrix who claims the property as a gift from the deceased, of proving by evidence which was clear and not equivocal or uncertain, that there was such a gift. It was essential to prove that there was an intention on the part of the deceased to transfer the title and right of possession of the property to the executrix and that there was a delivery of the subject matter of the gift by which he parted with all control over it. A verbal gift without a delivery transfers no title and unless the donor divested himself of all dominion over the subject matter of the gift the title will not pass. Millard vs Millard, 221 Ill. 86-93; also Kramer vs Habel, supra.

Delivery of a gift inter vivos is never presumed. All the essential elements of a gift inter vivos must be proved, but the one of these elements upon which clear and explicit evidence must be shown is delivery. The law never presumes a gift and the burden of proof thereof is upon the donee to prove the essential facts of the gift which essentials are the delivery of the property by the donor to the donee with intent to pass the title. Fanning vs Russell, 94 Ill. 386; Telford vs Patton, supra.

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[illegible] Tarlton va [illegible], [illegible].

So zealous is the law in guarding the estates of decedents that even where a deceased person has taken out a certificate of deposit in the name of some other person that in itself is not sufficient to constitute a valid gift. The delivery to the donee must still be proved and this delivery must be made with an intent to convey title. Farmers and Merchants State Bank vs Glass, [illegible] Ill. [illegible]. 251-260

Delivery of possession like any other fact may be proved by circumstantial evidence but in the case at bar there is no evidence either direct or circumstantial. This same situation arose in the case of Chicago Savings Bank and Trust Company vs Cohn, 197 Ill. App. 326, and in that case the court held that there was no gift because the record was silent on the question of delivery of possession.

This is not a case as is suggested by the executrix of trying the title to the property in controversy but is merely a hearing of objections to the final report of the executrix. There is no evidence in this record worthy to speak of as tending to sustain the contention of the executrix. When she filed her final report, if she failed to account for all of the assets of the estate, it was proper practice for those interested in the estate to object to the report as they did in this proceeding. Instead of accounting to the estate for the corn and the certificates of deposit when the report was objected to she makes the claim that the assets involved belong to her as a gift. We have seen that the rule as above announced, where she makes such a claim, must be established by proof of the gift and delivery, and this she has failed to do. We are of the opinion that the corn and the certificates of deposit were a part of the assets of the estate of the decedent, and that the circuit court was in error in holding that the executrix should not be required to account for the certificates of deposit. There is no merit in the contention of the appellee under her cross-assignment of errors.

So reading in the law in quashing the testes of decedents that even where a deceased person has taken out a certificate of deposit in the name of some other person that in itself is not sufficient to constitute a valid gift. The delivery to the donee must still be proved and this delivery must be made with an intent to convey title. [illegible]

[illegible]

Delivery of possession like any other fact may be proved by circumstantial evidence but in the case at bar there is no evidence either direct or circumstantial. This same situation arose in the case of Chicago Savings Bank and Trust Company vs Dunn, 327 Ill. App. 286, and in that case the court held that there was no gift because the record was silent on the question of delivery of possession.

This is not a case as is suggested by the executrix of trying the title to the property in controversy but is merely a hearing of objections to the final report of the executrix. There is no evidence in this record worthy to speak of as tending to sustain the contention of the executrix. When she filed her final report, if she failed to account for all of the assets of the estate, it was proper practice for those interested in the estate to object to the report as they did in this proceeding. Instead of her asking to the estate for the sum and the certificates of deposit, the record was objected to she makes the claim that the assets involved belong to her as a gift. We have seen that the rule as there announced, where she makes such a claim, must be established by proof of the gift and delivery, and this she has failed to do. We are of the opinion that the sum and the certificates of deposit were a part of the assets of the estate of the decedent, and that the circuit court was in error in holding that the executrix could not be required to account for the certificates of deposit. There is no merit in the contention of the appellee under her cross-assignment of error.

We are of the opinion therefore, that the order of the circuit court should be affirmed as to the corn. We are also of the opinion that the judgment and order of the circuit court should be reversed as to the holding that the certificates were the personal property of Kate McArdle; and that the order of the county court should be reversed as to its overruling the objections as to the corn and certificate in question, and the cause remanded to the county court with directions to sustain the objections to the final report and for such further proceedings as are consistent with this opinion, which is accordingly done.

Reversed and remanded with directions.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

_____
Clerk of the Appellate Court

(53761—3M—7-27)

abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-seven, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On 28 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

7777

R. P. SMITH AND SONS COMPANY,
a Corporation,

Appellee,

-vs-

Z. TWYMAN,

Appellant.

Appeal from the
Circuit Court of
Warren County.

Jett, P. J.

R. P. Smith and Sons Company, a corporation, appellee, instituted this suit in the Circuit Court of Warren County, against Z. Twyman, appellant, to recover for goods, wares and merchandise sold by appellee to the appellant. A jury trial was had with a finding in favor of appellee and against the appellant in the sum of $1662.37. Motion for a new trial was filed and argued by appellant which by the court was overruled and judgment was entered upon the verdict of the jury for said sum. Appellant prosecutes this appeal from said judgment.

The declaration consists of the consolidated common counts. The affidavit of merits accompanying the same alleged that the amount owing to appellee was $1709.83. To the declaration appellant pleaded the general issue with an affidavit of meritorious defense to the whole of appellee's claim.

Appellee was engaged in the wholesale boot, shoe and rubber footwear business in Chicago, and had been so engaged for a number of years prior to the bringing of this suit and made its sales to retail dealers through travelling salesmen. Appellant ran a retail store in the City of Monmouth. The evidence shows that during the year 1920 appellant had in its employment a number of travelling salesmen including one by the name of C. A. Magnuson. The record discloses that on April 7, 1920, appellant gave Magnuson five orders for shoes in sums varying from $27.88 to $644.00, due at various dates from

APRIL TERM 1927.

7777 16.

R. E. SMITH AND SONS COMPANY,
a Corporation,

Appellee,

Appeal from the
-vs-
Circuit Court of
C. TWYMAN,
Lawrence.

Appellant.

Jett, P. J.

R. E. Smith and Sons Company, a corporation, appellee, instituted this suit in the Circuit Court of Lawrence County, against C. Twyman, appellant, to recover for goods, wares and merchandise sold by appellee to the appellant. A jury trial was had with a finding in favor of appellee and against the appellant in the sum of $1668.37. Motion for a new trial was filed and argued by appellant which by the court was overruled and judgment was entered upon the verdict of the jury for said sum. Appellant prosecutes this appeal from said judgment.

The declaration consists of the consolidated common counts. The affidavit of merits accompanying the same alleged that the account owing to appellee was $1709.68. To the declaration appellant filedsd the general issue with an affidavit of meritorious defense to the whole of appellee's claim.

Appellee was engaged in the wholesale boot, shoe and rubber footwear business in Chicago, and had been engaged for a number of years prior to the bringing of this suit and made the sales to retail dealers through travelling salesmen. Appellant was a retail store in the City of Lawrence. The evidence shows that during the year 1920 appellant had in its employment a number of travelling salesmen including one by the name of J. A. Lawrence. The record discloses that on April 7, 1920, appellant gave Lawrence five orders for shoes in sums varying from $27.68 to $64.50, one of various dates from

thirty days after November 1st. On May 26th, 1920 appellant gave Magnuson another order amounting to $261.30 payable in thirty days. On August 4, 1920, two more orders were given, one in the sum of $864.35, payable October 1st, and another for $561.35, which was for spring goods, and not to be shipped until January 1st, following and was payable May 1st, following. This last order for $561.35, payable May 1st, was cancelled by agreement of the parties November 16th, 1920. The total of all of the orders exclusive of [illegible] cancelled [illegible] $2,862.35, on which payments amounting to $618.68 were made prior to August 17th, 1920.

The orders given contained the stock numbers by which the various articles were identified, the prices per pair, the total amount of the order and when payable. The orders were forwarded by the salesman Magnuson to appellee at Chicago and would first be delivered to the sales department where they were entered and transferred to the credit department where they were approved and recorded. In each instance a copy of the order and an acknowledgment slip was mailed to appellant. The copy mailed to appellant showed the stock number, the number of pairs, the price per pair and the total amount of the order, together with the date when payable.

Several of the orders given were filled by shipping the goods immediately after the receipt of the order and the acknowledgment of the same and all orders given, with the exception of the one cancelled, were shipped prior to August 27th 1920. Appellant accepted all of the articles so shipped without any complaint or objection except the shipment of the order dated August 4, 1920, for $864.35, and which was shipped August 12, 1920. As to this order appellant did not make objection to appellee but refused to accept the shipment when it arrived at the freight house in Monmouth. The freight agent notified appellee of the refusal of appellant to accept the shipment whereupon appellee wrote to the freight agent the following letter:-

> "We are this day writing our customer Z. Wyman of your city, relative to disposition of shipment of August 12, consisting of seven cases of shoes now holding at your station refused. This customer will undoubtedly arrange for disposition of the shipment shortly so that it will not be necessary for us to take any action. We are, however, writing our representative at Galesburg, who will give the matter attention within the course of the next few days."

Appellee then wrote Magnuson that the goods had been refused and suggested that he get in touch with the customer and determine the cause for the refusal as it had no information on the case and that it had written the freight agent at Monmouth to hold the goods until appellee received definite information from Magnuson relative to the cause for the refusal. The record discloses that appellant testified that some four or five days after the letter was received by said agent, Magnuson called upon him and stated, "Well, I got a letter from the company advising me to come here and make an adjustment with you for the goods that was shipped you. We know that you didn't order them but you had such a prosperous business we want to make you some money." Appellant further testified that Magnuson said [illegible] with him if he would take the shoes. Appellant also stated that he said to Magnuson that he sent him shoes that he did not order and that Magnuson said: "Well, but I will tell you what to do. You take these shoes and I will come down and I will help you earn them and I will make a little disposition on part of them that there is a little overcharge. I think $1.30, something like that and you take the goods and dispose of all you can. I will give you from now until the first of May 1921 to dispose of them and all you hav'nt sold, any you have on your hands that come from our house, box them up and return them to the house at the invoice price." Appellant further testified that he said: "That looks pretty reasonable, but I said, you put that down in writing," and he said, "Well, I will make it out in writing." It

that time a memorandum was given appellant signed by Magnuson as follows:

> "When this bill becomes due if there are any shoes that you have not sold and want to return, I will take them off your hands and credit you with the same."
>
> (Signed) C. . . . - .C. Lefroul, Witness."

It is by reason of the above memorandum appellant claims the right to return to appellee any time before May 1st, 1921, any goods that had been purchased and which had not been sold. Appellant also claims that at the time of the giving of said memorandum, Magnuson gave him a credit slip of a price adjustment to the amount of 1.80, and introduced in evidence such credit slip. Witnesses for appellee in rebuttal stated that the credit slip such as appellant held was not issued by salesmen but by the company's merchandise department in Chicago, and that the written part of said slip was not in the handwriting of Magnuson but was in the handwriting of one in the merchandise department of appellee and that said credit slip for the readjustment price was made without cu[illegible] anyone.

Appellant insists that he had the right under his agreement with Magnuson to return the goods he did in payment of the balance owing by him from Appellee. It is the contention of appellee that Magnuson had no authority as its agent to make the agreement which it is claimed he made with appellant, giving him the right to return the goods in question; that the o[illegible] authority Magnuson had was that of a sales agent, his authority being limited to taking orders for goods from retail dealers to be [illegible] them at the price named in the orders. Whether Magnuson had the authority or not to bind the appellee is not a material question in this proceeding, in view of the conclusion we have reached. Whether Magnuson had the authority as contended by the appellant and whether or not the memorandum above quoted was binding upon appellee, the subsequent conduct and acts of appellant are such as to indicate that he did not regard the memoran-

"When the a bill bounce, me if there one any cause that you have not left, let me to know. I will be there out you to see still you with the mone."

dum as binding upon either the appellee or himself. Subsequent to the time of the making of the memorandum, relied upon by appellant, as giving him the right to return the goods to appellee at any time before May 1st, 1921, appellant made payment on the account. On September 8th, after the execution of said memorandum, appellant mailed a check to appellee at Chicago for two hundred and fifty dollars to apply on the account; on October 23rd, one hundred and twenty-five dollars was paid to appellee to apply on the account.

The record discloses that appellee from time to time sent statements to appellant of the amounts it claimed to be owing from appellant, which included all of the goods then in his hands and the account so rendered. Not having been objected to by appellant and appellant having made payments thereon, and promised appellee to pay the balance of the account so rendered, would be sufficient on which to base a right of recovery in appellee's favor on an account stated. From an investigation of the record we find that in the month of November, 1920, appellee wrote the following letter to appellant.

> "On November 17th, we wrote you, requesting that you send us a check for $500.00 to apply on your account, but it has not been received. Please send it to us to apply on the attached statement, which shows the amount charged to you on our books of $1862.37."

The record also discloses that on December 2, 1920, appellant wrote appellee the following letter:

> "I am sending you a check for $100.00 for which please give me credit for on my account. I will send you some more the first of the month. I would like for you to cancel the future order which I told your representative to do when he called upon me some short time ago, and oblige."

On December 10th, 1920, appellant wrote appellee as follows:

> "Enclosed find a check for $100.00 on account for which please give me credit. Please do not send any more shoes at all until I order some more as I cancelled all orders that had been made. I will send you the remainder of the money as I made arrangements with one of your firm when he called upon me. I will send you remittances as soon as I can spare it until I get it all paid up in full."

We are of the opinion that by reason of the proof made on

Gum as building upon either the [illegible] or it self. Whereupon to the time of the making of the [illegible], relied upon by appellant, as giving him the right to address the [illegible] to appellee at any time before May 1st, 1921, appellant made payment on the account. On [illegible] mailed a check to appellee at Chicago for ten hundred and fifty dollars to apply on the account; on October 22nd, one hundred and twenty-five dollars was paid to appellee to apply on the account.

The record discloses that appellee then wrote to him sent statements to appellant of the amounts it claimed to be owing from appellant, which included all of the goods then in his hands and the account so rendered. Not having been objected to by appellant and appellant having made remarks thereon, and promised appellee to pay the balance of the account as rendered, would be sufficient on which to base a right of recovery in appellee's favor on an account stated. From an investigation of the record we find that in the month of November, 1920, appellee wrote the following letter to appellant.

> "On November 17th, we wrote you, [illegible] that you had us a check for $500.00 to apply on our account, but it has not been received. Please see it to us to apply on the attached statement, which shows the amount charged to you on our books of $1828.37."

The record also discloses that on December 3, 1920, appellant [illegible]

> "I am sending you a check for $100.00 for which please give me credit for on my account. I will send you each week the [illegible] of the month. I would like for you to answer the letter [illegible] which I told your representative to do when he [illegible]

On December 10th, 1920, appellant wrote appellee as follows:

> "Enclosed find a check for $[illegible].00 on account for which please give me credit. [illegible] do not see any [illegible] collect all orders that we have made. I will send you the remainder of the money as I make a [illegible] with one of your [illegible] who be called upon me. I will send you [illegible] as soon as I can spare it until I get it all paid up in full."

We are of the opinion that by reason of the proof made on

the part of appellee of the mailing of the statements as is disclosed by the correspondence and the payments made by appellant on such account, together with his promise to pay in full was sufficient to support the finding of the jury and judgment thereon in favor of appellee unless the court in the trial of said cause committed error in the giving or refusing of instructions or in its ruling or in the admissibility of testimony which would require a reversal. In reaching this conclusion, we are not unmindful of the fact that it is insisted by appellant that the suit was prematurely brought inasmuch as it was instituted prior to May 1st, 1921. In our opinion this point is not well taken for the reason that appellant had returned, prior to May 1st, and prior to the institution of the suit, the goods which he insisted covered the amount owing to him by appellee in full. This being the position of appellant, it was not necessary for appellee to wait until after May 1st, 1921 to bring suit, especially in view of the evidence that appellee had claimed that the same was due and had been rendering accounts therefor, and appellant had been making payments on the account and had promised to pay the balance. By reason of the state of the record as is shown to have existed prior to the institution of the suit, it was not prematurely brought. It was not a question to be left to the jury, in view of what is disclosed by the record as to whether or not the suit was prematurely instituted.

It is the contention of appellant that there was no agreement as to the price to be paid for the goods; that no recovery was warranted without proof of the time for payment and the reasonable value of the goods in dispute.

The record discloses that the orders taken by Magnuson were not signed by appellant. That the acknowledgement which the company sent out of orders received through their sales agent

the part of appellant c. the making of the statements as is disclosed by the correspondence and the payments made by appellant on such account, together with the premise to say in full was sufficient to support the finding of the jury and judgment thereon in favor of appellee unless the court in the trial of such cause committed error in the giving or refusing of instructions or in the ruling or in the admissibility of testimony which would require a reversal. In reaching this conclusion, we are not unmindful of the fact that it is insisted by appellant that the suit was prematurely brought inasmuch as it was instituted prior to May 1st, 1921. In our opinion this point is not well taken for the reason that appellant had returned, prior to May 1st, and prior to the institution of the suit, the goods which he insisted covered the amount owing to him by appellee in full. This being the position of appellant, it was not necessary for appellee to wait until after May 1st, 1921 to bring suit, especially in view of the evidence that appellee had claimed that the same was due [illegible] making payments on the account and had promised to pay the balance. By reason of the state of the record as is shown to have existed prior to the institution of the suit, it was not prematurely brought. It was not a question to be left to the jury, in view of what is disclosed by the record as to whether or not the suit was premature. [illegible]

It is the conclusion of appellant that there was no agreement as to the price to be paid for the goods; that no recovery was warranted without proof of the value for payment and the reasonable value of the goods in dispute.

The record discloses that the orders taken by Hammon were not signed by appellant. Then the acknowledgement which the [illegible] part was of orders received through their sales agent

stated the amount in dollars and cents and that the order clearly stated that "goods returned without our consent will be refused."

We are of the opinion that where an order given by a retail dealer to a wholesaler through a traveling agent where the invoice accompanying the goods shipped pursuant to such order states the price of the same and the goods are received by the retailer without objection the price to be paid therefor must be the price named in the invoice. Where goods are bought by an order and nothing is said in the order about the price to be paid and the goods are shipped to the purchaser and he accepts the same with knowledge of the price charged he is bound to pay that price. Estey Organ Company, vs Lehman, Mis; 11 R. L. S. (T. S.) 254.

Appellant insists that instruction number 2 given on the part of appellee is erroneous inasmuch as it fails to properly announce the rule growing out of the facts in this proceeding. We are convinced that instruction number 2 complained of is subject to criticism. Taking it in connection with the other instructions, however, and regarding the instructions as a series, we do not think it constitutes reversible error. Appellant also insists that the court erred in giving instruction number 3 read to the jury on the part of appellee. We do not think that the giving of this instruction even though not entirely correct in the statement of the law was prejudicial to the rights of appellant for the reason that the evidence in the record does not tend to show a ratification on the part of appellee of the contract or agreement with Magnuson. Appellee continued to send statement of the account with letters requesting payment.

The record further discloses that appellant contends that the court erred in refusing to give instruction number 14 offered by him. This instruction has been given frequently, but inasmuch as from the record there can be no question by appellant of appellee's right to recover unless appellant's contention with

In one of the opinion has there an order given by a retail dealer to a wholesaler through a brokering agent where invoice accompanying the goods shipped warrant to such order state the price of the same and the goods are received by the dealer without objection the price to be paid therefor must be the price named in the invoice. Where goods are bought by an order and working in said in the order where the price to be paid for the goods are shipped to the purchaser and he accepts the same knowledge of the price charged he is bound to pay that price. Duty Dupont Company, vs Tobman, Ala; 12 N. W. R. (2d. Ser.) 284.

Appellant testified that testimonies produced a claim for the price of appellee in erroneous invoices or is liable to damages because the rule governing out of the terms in this proceeding. It is admitted that instruction number 2 complained of is subject to criticism. Taking it in connection with the other instructions, however, and regarding the instructions as a whole, we do not think it constitutes reversable error. Appellant also insists that the court erred in giving instruction number 3 read to the jury on the part of appellee. We do not think that the giving of this instruction even though not strictly correct in the statement of the law was prejudicial to the rights of appellant in the reason that the evidence in the record does not tend to show a violation on the part of appellee of his contract or agreement with the company. Appellee contended to such statement of the receipts with Lockhart Lumber Company.

The record further discloses that a written contract that the court erred in refusing to give instruction number 14 offered by him. This instruction was given therefore, but inasmuch as from the record there can be no question by appellant of appellee's right to recover where appellant's counter claim with

[illegible]

[illegible] of the balance owing by him to appellee. That defense was an affirmative one and the burden of proof was upon appellant to establish the fact that [illegible] appellant and [illegible] [illegible] in question is [illegible] to appellee. The court did not err in [illegible] appellant.

[illegible]

The above and foregoing [illegible] having [illegible] upon by the respective parties, we are of the opinion that no reversible error was committed in the trial of the case [illegible] judgment, therefore, of the Circuit Court of Warren County will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty- _____

_____

Clerk of the Appellate Court

(53761—3M—7-27)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-seven, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JAN 28 1928 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 7817 Agenda No. 9

In The

APPELLATE COURT OF ILLINOIS

Second District.

October Term, A.D., 1927.

MICHIGAN CENTRAL RAILROAD COMPANY, Appellee, vs. PEORIA & PEKIN UNION RAILWAY COMPANY, Appellant, and HARRY I. BATTLES, Receiver, Operating PEORIA RAILWAY TERMINAL COMPANY, Defendant.	Appeal from Circuit Court Peoria County

---

OPINION by BOGGS, J.

An action in assumpsit was instituted by appellee against appellant and Harry I. Battles, Receiver operating the Peoria Railway Terminal Company (hereinafter referred to as the Receiver), in the circuit court of Peoria county to recover the value of two freight cars which had been destroyed by fire.

The declaration consists of one count, and avers that appellee, appellant and said Receiver were common carriers for hire and were subscribers and parties to a certain agreement providing for the interchange of traffic, known as the American Railway Association Code of Rules; that Rule 113 of said Code provides among other things that settlement for a car damaged or destroyed upon a private track, shall be assumed by the railway company delivering the car upon such track; that prior to January 3, 1924, appellee was the owner of two freight cars, which were delivered to appellant, consigned to the Corn Products Refining Company at Pekin, under said rules; that appellant, without the knowledge of appellee, under a

In the

Second District.

October Term, A.D., 1897.

MIDLAND MUTUAL RAILWAY COMPANY, Appellee, vs. PEORIA & PEKIN UNION RAILWAY COMPANY, Appellant, and JOHN L. BATTIES, receiver, operating MORIA RAILWAY TERMINAL COMPANY, Defendant.	Appeal from Circuit Court Peoria County. Peoria County

---

OPINION BY BOGGS, J.

An action in assumpsit was instituted by appellee against appellant and Henry L. Batties, receiver operating the Peoria Railway Terminal Company (hereinafter referred to as the Receiver), in the circuit court of Peoria county to recover the value of one freight car which had been destroyed by fire.

The declaration consists of one count, and avers that appellee, appellant and said Receiver were common carriers for hire and were subscribers and parties to a certain agreement providing for the interchange of traffic, known as the American Railway Association Code of Rules; that Rule 115 of said Code provides among other things that settlement for a car damaged or destroyed upon a private track, shall be assumed by the railway company delivering the car upon such track; that prior to January 3, 1894, appellee was the owner of two freight cars, which were delivered to appellant, consigned to the Corn Products Refining Company at Lemon, under said rules; that appellant, without the knowledge of appellee, under a

private agreement with the Peoria Railway Terminal Company through the service and agency of said terminal company, delivered said cars upon the private tracks of the Corn Products Refining Company, where they were destroyed, and that by reason of the obligations set forth in said Rule 113, appellant and the said Receiver each became obligated to pay appellee the value of said cars, with interest thereon.

To said declaration appellant filed a plea of the general issue; a special plea averring that it was not jointly liable with said Receiver; and a plea averring that the rules of said Association provide for an arbitration committee to which the members should submit disputes arising under said rules, and that the decisions of said arbitration committee should be final and binding upon the parties concerned; that after the destruction of said cars appellee submitted to said arbitration committee the question whether, under rule 113, appellant or said Receiver was liable for the value of said cars; that, upon a hearing, said committee found and decided that the Peoria Railway Terminal Company, was responsible under said Rule, and that said decision was binding upon appellee.

Harry I. Battles, Receiver, etc., filed a plea of the general issue and a special plea averring that he did not deliver the cars, etc. as alleged in said declaration.

A jury was waived and on the trial of said cause the parties stipulated the facts, which, so far as pertinent to the issues here involved, are substantially as follows:

1. That appellee is entitled to a judgment against one or the other of the companies sued, for the principal sum of $4,355.4[illegible] and interest, if allowed by the court; that demand for said sum was made on appellant on February 28th, 1924, and on said Receiver on March 15th, 1924.

2. That appellant and said Receiver operate lines of steam railways in the State of Illinois, and each own and operate extensive terminal facilities in the cities of Peoria and Pekin for

[illegible] with the Peoria Railway Terminal Company through the service and agency of said terminal company, delivered said cars upon the private tracks of the Peoria Terminal Company, where they were destroyed, and that by reason of the obligations set forth in said Rule 112, appellant and the said receiver each became obligated to pay appellee the value of said cars, with interest thereon.

To said interlocutory appellant filed a plea of the general issue; a special plea averring that it was not liable; issue was joined upon said pleadings; and [illegible] trial [illegible] dispute arising under said rules, and that the decisions of said arbitration committee should be final and binding upon the parties concerned; that after the destruction of said cars appellee submitted to said arbitration [illegible] appellant or said Receiver was liable for the value of said cars; that, upon a hearing, said committee found and decided that the Peoria Railway Terminal Company, was responsible under said Rule, and that said decision was binding [illegible].

Henry L. Rattles, Receiver, etc., filed a plea of the general issue and a special plea averring that he did not deliver the cars, as alleged in said declaration.

A jury was waived and on the trial of said cause the parties stipulated the facts, which, so far as pertinent to the issues here involved, are substantially as follows:

1. That appellee is entitled to a judgment against one or the other of the companies sued, for the principal sum of $2,355.64 and interest, if allowed by the court; that demand for said sum was made on appellant on February 28th, 1924, and on said Henry L. Rattles March 10th, 1924.

2. That appellant and said Receiver operate lines of steam railways in the State of Illinois, and each has and owns extensive terminal facilities in the states of Peoria and Pekin for

the handling of freight, cars and trains used in the transportation thereof. Each company is entirely independent as to stock ownership, and each has its separate and distinct officials, operating personnel and equipment, and each company holds itself out to the public as an independent common carrier, and each is a party to the American Railway Association Interchange Rules, and to the Car Service and Per Diem Agreement, etc.

3. That appellant's tracks did not, on the date of the injuries complained of, connect with the privately owned tracks of the Corn Products Refining Company, but on May 21st, 1923, it had entered into a contract with the Chicago, Pekin & St. Louis Railroad Company, whereby, it was granted certain operating privileges over the tracks of said company so that it could make direct connection with the private yard tracks of the Corn Products Refining Company.

4. That the Peoria Railway Terminal Company, at the time of said injuries and prior thereto, owned and possessed tracks which made direct connection with the private yard tracks of the Corn Products Refining Company.

5. That on November 1st, 1923, appellant and said Receiver entered into an operating agreement, whereby, in order to avoid confusion, the Peoria Railway Terminal Company undertook to handle cars delivered to it by appellant to the Corn Products Refining Company, at a certain price per car.

6. Under the operating agreement between appellant and said Receiver, said cars remained in the per diem and demurrage account of appellant; they were not reported to the owner, appellee, as being delivered to the Peoria Railway Terminal Company, for car accounting purposes, under the American Railway Association Interchange Rules.

7. On December 31st, 1923, pursuant to this arrangement, the two cars in question were delivered by appellant to the Peoria Railway Terminal Company, and by that company were delivered, over its terminal lines, to the Corn Products Refining Company. On January 3rd, 1924, an explosion occurred in the plant of said Corn Products

and each has its agents and distinct officials, operating personnel and equipment, and each company bills their cars to the public as on [illegible]

Railway Association Interchange Rules, and to [illegible] the terminal and the Dam [illegible], etc.

3. That appellants trucks did not, on the date of the injuries complained of, connect with the privately owned tracks of the Corn Products Refining Company, but on May 8th, 1922, it had entered into a contract with the Chicago, Peoria & St. Louis Railroad Company, whereby, it was provided [illegible] the tracks of said company so that it could make direct connection with the private [illegible] tracks of the Corn Products Refining Company, at the time of said injuries and prior thereto, owned and possessed tracks which made direct connection with the private yard tracks of the Corn Products Refining Company.

5. That on November 1st, 1925, appellant and said receiver entered into an operating agreement, whereby, in order to avoid congestion, the Peoria Railway Terminal Company undertook to handle cars delivered to it by appellant to the Corn Products Refining Company, at a certain price per car.

6. Under the a working agreement between appellant and said Receiver, said cars remained in the per diem and insurance account of appellant; they were not reported to the owner, appellee, as being delivered to the Peoria Railway Terminal Company, for car accounting purposes, [illegible]

7. On December 31st, 1926, pursuant to this agreement, the two cars in question were delivered by appellant to the Peoria Railway Terminal Company, and by that company were delivered, over its terminal lines, to the Corn Products Refining Company. On January 3rd, 1924, an explosion occurred in the plant of said Corn Products

Refining Company, whereby said cars were practically destroyed. The explosion and fire was not caused by the negligence of either of said terminal railroads.

8. Payment having been refused by appellant and by said Receiver as above set forth, appellee submitted to the arbitration committee the question as to whether appellant or the Peoria Railway Terminal Company, was liable for said damages; notice was given to both of said terminal companies as required by said rules, but neither of them participated on the hearing. Appellee made an ex parte presentation of its case, which is the customary mode of procedure before said committee when one or more of the parties do not participate. The arbitration committee rendered the following decision:

"The delivery of cars upon the track of the Corn Products Refining Company having been made by the Peoria Railway Terminal Company, that Company is responsible under Rule 113 insofar as settlement with car owner is concerned.

"The question of responsibility as between the Corn Products Refining Company and Peoria Railway Terminal Company and Peoria & Pekin Union Railway Company, on basis of local agreement, is not within the jurisdiction of the Arbitration Committee."

A finding was made and judgment rendered in favor of appellee and against appellant for $4,355.44. To reverse said judgment, this appeal is prosecuted.

The assignment of errors, and the briefs and arguments of the respective counsel representing appellant, appellee and the Receiver, raise the following principal questions:

1. As to whether the court erred in rendering judgment against one defendant on a declaration charging a joint and several liability as to two defendants.

2. Whether the decision of the arbitration committee was binding on the parties hereto.

As to the first contention, the parties hereto joined in

[illegible] thereby said cars were practically destroyed. The appellee [illegible]

2. [illegible]

submitted the question as to whether appellant or the Peoria Railway Terminal Company, was liable for said damages; notice was given to both of said terminal companies as required by said rules, but neither of them participated [illegible] presenta-tion of its case, which is the customary mode of procedure before said committee when one or more of the parties do not participate. The arbitration committee rendered the following decision:

"The delivery of cars upon the track of the Corn Products Refining Company having been made by the Peoria Railway Terminal Company, that Company is responsible under Rule 115 insofar as settlement with car owner is concerned.

"The question of responsibility as between the Corn Products Refining Company and Peoria Railway Terminal Company and Peoria & Pekin Union Railway Company, on basis of local agreement, is not within the jurisdiction of the Arbitration Committee."

A finding was made and judgment rendered in favor of appellee and against appellant for $4,355.44. To reverse said judgment, this appeal is prosecuted.

The assignment of errors, and the briefs and arguments of the respective counsel representing appellant, appellee and the receiver, raise the following principal questions:

1. As to whether the court erred in rendering judgment against one defendant on a declaration charging a joint and several liability as to two defendants.

2. Whether the decision of the arbitration committee was binding on the parties hereto.

As to the first contention, the parties hereto joined in

stipulating that appellee is entitled to recover $4,355.44 against either appellant or the Receiver, as its damages for the destruction of said cars. The parties thereby waived a strict conformance to the pleadings, and the court did not err in rendering judgment against one defendant. Smith v. City of Chicago, 107 App. 270-279; affirmed in 204 Ill. 356.

On the second proposition, appellee having submitted the question here in controversy to the arbitration committee, it is not in a position to contend that the finding of said committee is not binding upon it.

The Receiver also insists under this proposition that said finding is not an award and is not binding upon him for the reason that it does not fix the amount due to appellee. This point is not well taken. Parties or corporations have the right to bind themselves to submit to arbitration, controversies or issues not necessarily involving a pecuniary determination. In this case there was no controversy among the parties as to the amount of damages appellee is entitled to recover. The matter in controversy was as to whether appellant or said Receiver was liable therefor, and that was the matter submitted to and determined by said arbitration committee.

The parties hereto stipulated that appellee is entitled to recover against appellant or the Receiver. If appellee is entitled to recover against either, it is by virtue of the rules and regulations of the American Railway Association, for under the common law, the possession of said cars having passed beyond the control of both of said terminal companies, neither of them would be liable. Connecting Ry. Co. v. W., St. L. & P. Ry. Co., 123 Ill. 594-599; Peoria & P. U. Ry. Co. v. U. S. R. S. Co., 136 Ill. 643-651. In the latter case the court at page 651 says:

"In the case at bar, appellant received from the transporting line, (appellee's lessee,) in the regular course of its business, the cars in question, to be transported over its tracks to the sugar

[illegible]

[illegible] damages, and the owner did not sue in tortious proceeds against defendant. Smith v. Duty of Chicago, 107 Ky. 490-494; affirmed in [illegible].

[illegible]

[illegible]ion here in controversy is the arbitration clause, it is not in a position to contend that the finding of said committee is not binding upon it.

The Receiver also insists under this proposition that said finding is not an award and is not binding upon us for the reason that it does not fix the amount due to appellee. This point is not well taken. Finding is [illegible] it is subject to arbitration, controversies or issues not necessarily involving a pecuniary determination. In this case there was no controversy among the parties as to the amount of damages appellee is entitled to recover. The matter in controversy was as to whether appellant or said Receiver was liable therefor, and that was the matter [illegible].

The parties hereto stipulated that appellee is entitled to recover against appellant or the Receiver. If appellee is entitled to recover against either, it is by virtue of the rules and regulations of the American Railway Association, for under the common law, the possession of said cars having passed beyond the control of both of said terminal companies, neither of them would be liable. Cummesting Ry. Co. v. R., 14. L. & N. Ry. Co., 185 Ill. 394-399; Toledo & K. U. Ry. Co. v. U. R. R. & Co., 186 Ill. 640-651. In the latter case the court [illegible] said:

"In the case at bar, appellant received from the transporting line, (appellee's lessee,) in the regular course of its business, the cars in question, to be transported over its tracks to the usual

refinery, there to be left standing, on appellant's tracks at the refinery, until unloaded by the consignee of the contents of the cars.*** By the terms of the contract of carriage, the control of the goods ceased absolutely by the delivery to the consignee on the track, and was suspended, as to the cars, for an indefinite period, the duration of which was to be determined, not by appellant, but by the consignee of the goods. Until the consignee had unloaded the cars, appellant had no right to remove them, and take them to its storage yard, or other place of safety."

In this case, the Peoria Railway Terminal Company, made the physical delivery of the cars to the Corn Products Refining Company, and the cars were in the possession and control of said refining company on its private track. The common law liability, then, of appellant and of the Peoria Railway Terminal Company, had ceased. In stipulating appellee's right to recover the parties stipulated a right of recovery under the American Railway Association rules, aside from such rules, there was no right to a recovery.

Our supreme court has held, in what are known as the Board of Trade cases, that membership in associations of that character renders the members amenable to its rules, and, if the rules so provide, they may be expelled from membership for violation of the same. Fitcher v. Board of Trade, 121 Ill. 412; Ryan v. Cudahy, 157 Ill. 108; Pacaud v. Wait, 218 Ill. 138. Our courts have also enforced the provisions of contracts where parties have agreed to submit certain differences in their building contracts to the architect for final decision.

Each member, on joining the American Railway Association, signed an agreement called the Interchange Agreement, as follows:

"The subscriber hereto adopts and agrees, jointly and severally, with each and all other parties * * * which parties have respectively entered into agreements in effect similar to this instrument, that the Subscriber will abide by the Code of Rules governing the condition of, repairs to and settlements for freight cars for the

[illegible] by the members of the company or by some [illegible] of [illegible], the conduct of the [illegible] [illegible] of the people. While one conductor had [illegible] the train, [illegible] had [illegible] to remove them, [illegible] to the station yard, or other [illegible].

In this case, the People Railway Terminal Company, with the [illegible] delivery or the case to the Home Protection Publishing Company, and the case were in the possession and control of said publishing company on its private track. The common law liability, then, of appellant and of the People Railway Terminal Company, had ceased. The shipping [illegible] right to recover the damages sustained a right of recovery under the American Railway Association rules, quite from such rules, there was no right to a recovery.

One question much has held, in such cases from as the Interstate Commerce Commission, that conferences in associations or that associations restrain the members according to its rules, and, if the rules so provide, they may be expelled from membership for violation of the same. Interior v. Board of Trade, 1st Ill. 443; Munn v. Illinois, 107 Ill. 169; Lucas v. [illegible], 219 Ill. 128. Our courts have also considered the provisions of associations where members have agreed to submit certain differences in their business contracts to the arbitrator for final decision.

Each member, on joining the American Railway Association, signed an agreement called the Interchange Agreement, as follows:

"The subscriber hereby adopts and approves, individually and severally, with each and all other parties [illegible] which articles have respectively subscribed into agreements in effect similar to this Interchange Agreement, that the subscriber will abide by the rules of order governing the association of, regards to and indemnifies for losses occur for the

interchange of traffic, * * * (which rules are designated on the minutes of said Association's proceedings and are commonly known as 'Interchange Rules'), and by each of said rules, and as well will abide by each and all decisions and interpretations of the Arbitration Committee provided for by said Code of Rules."

Rule 113 of said Code provides:

"For the mutual advantage of railway companies interested, the settlement for a car owned or controlled by a railroad company, when damaged or destroyed upon a private track, shall be assumed by the Railway Company delivering the car upon such track.

"When a car owned or controlled by a railway company is damaged or destroyed on the tracks of a road which is not a member of the per diem rules agreement of the American Railway Association the road responsible for the per diem while in the possession of the non-subscriber shall be responsible to the owner for damage to or destruction of the car."

Rule 123 provides:

"In order to settle disputes arising under the rules, and to facilitate the revision of the rules at the annual conventions of the Association, an Arbitration Committee of seven representative members and two representatives of the private car owners shall be appointed annually by the General Committee; five members of this committee to constitute a quorum.

"In case of any dispute or question arising under the rules between the subscribers to said rules, the same may be submitted to this committee, through the Secretary, to receive consideration by the Arbitration Committee.

"Should one of the parties refuse or fail to furnish the necessary information, the committee shall use its judgment as to whether, with the information furnished, it can properly give its opinion. The decisions of the committee shall be final and binding upon the parties concerned."

Interchange of Cars. [illegible]

Rules 2, said Association, [illegible] 'Interchange Rules'), and by each of said rules, and as well will abide by each and all decisions and interpretations of the Arbitration Committee provided for by said Code of Rules.

Rule 116 of said rule provides:

"For the mutual advantage of railway companies interested, settlement for a car owned or controlled by a railroad company, when damaged or destroyed upon a private track, shall be assessed by the railway company delivering the car upon such track.

"When a car owned or controlled by a railway company is damaged or destroyed on the tracks of a road which is not a member of the car claim rules agreement of the American Railway Association the road responsible for the car claim while in the possession of the non-member shall be responsible to the owner for damage to or destruction of the car."

"In order to settle disputes arising under the rules, and to facilitate the revision of the rules at the annual convention of the Association, an Arbitration Committee of seven representative members and two representatives of the private car owners shall be appointed annually by the General Committee; five members of this committee to constitute a quorum.

"In case of any dispute or question arising under the rules between the subscribers to said rules, the case may be submitted to this committee, through the secretary, to receive consideration by the arbitration committee.

"Should one of the parties refuse or fail to furnish the necessary information, the committee shall use its judgment as to whether, with the information furnished, it can properly give its opinion. The decisions of the committee shall be final and binding upon the parties concerned."

It will be observed, therefore, that the parties hereto have bound themselves to abide by the decisions and interpretations of said committee, so that if it be held that the decision of said committee amounted only to an interpretation of Rule 113 as applied to the controversy between appellant and said Receiver, it would be binding on them.

The committee had before it the statement filed by appellee, submitting the question for arbitration, and the agreement entered into between appellant and said Terminal Company; the submission filed by appellee discloses the facts with reference to the delivery of its cars to appellant, by appellant to the Peoria Railway Terminal Company, by it to the Corn Products Refining Company, and the destruction of said cars while in the possession of said refining company.

So far as the record discloses, it would seem that the committee had before it all of the facts necessary for the determination of the question submitted to it. If appellant or said receiver were not satisfied with the facts submitted, they had the opportunity to offer such additional facts as they deemed necessary. Not having done so, they are not in a position to complain that the committee did not have all of the facts before it.

On the proposition that the Peoria Railway Terminal Company was the agent of appellant in delivering the cars in question to the Corn Products Refining Company, it is only necessary to say that, while as between appellant and said terminal company or its Receiver, such agency may have existed, the determination of said committee was to the effect that such agency did not affect the determination as to who in fact, under the American Railway Association rules, was to be held as the delivering company when the question of damages for loss or destruction of cars were involved, as here.

Lastly, it is contended by the Receiver that he was not a party to the submission to arbitration. The Peoria Railway Terminal Company was a member of the American Railway Association at the time Mr. Battles became its Receiver. It was stipulated that appellant

It will be observed, therefore, that the parties hereto have bound themselves to abide by the decisions and interpretations of said committee, so that if it be held that the decision of said committee amounted only to an interpretation of Rule 115 as applied to the controversy between appellant and said receiver, it would be binding on them.

The committee had before it the statement filed by appellee, submitting the question for arbitration, and the agreement entered into between appellant and said Terminal Company, [illegible] by appellee disclosed the facts with reference to the delivery of the cars to appellant, by appellant to the Peoria Railway Terminal Company, by it to the Corn Products Refining Company, and the destruction of said cars while in the possession of said refining company.

So far as the record discloses, it would seem that the committee had before it all of the facts necessary for the determination of the question submitted to it. If appellant or said receiver were not satisfied with the facts submitted, they had the opportunity to offer such additional facts as they deemed necessary. Not having done so, they are not in a position to complain that the committee did not have all of the facts before it.

On the proposition that the Peoria Railway Terminal Company was the agent of appellant in delivering the cars in question to the Corn Products Refining Company, it is only necessary to say that, while as between appellant and said terminal company or its receiver, such agency may have existed, the determination of said committee was to the effect that such agency did not affect the determination as to who in fact, under the American Railway Association rules, was to be held as the delivering company when the question of damages for loss or destruction of cars were involved, as here.

Lastly, it is contended by the receiver that he was not a party to the submission to arbitration. The Peoria Railway Terminal Company was a party to the [illegible] [illegible] appellee [illegible] the [illegible]. It was stipulated [illegible] appellant

Lastly, it is contended by the Receiver that he was not a party to the submission to arbitration. The Peoria Railway Terminal Company was a member of the American Railway Association at the time Mr. Settles became its Receiver. It was stipulated that appellant and said terminal company had been regularly notified of the hearing before said committee, as provided by said Code of Rules. The question here sought to be raised was evidently not raised in the trial court, either by the pleadings, proposition of law or otherwise. That being the state of the record and in view of the fact that appellee Receiver joined in said stipulation to the effect that judgment should be rendered either against him as such Receiver or against appellee Peoria & Pekin Railway Company, he is in no position to complain that he was not a party to said proceeding before the arbitration committee.

For the reasons set forth above, the judgment of the trial court will be reversed and remanded.

and said terminal company [illegible] regularly [illegible] on the hearing before said committee, as provided by said Code of Rules. The question here sought to be raised was evidently not raised in the trial court, either by the pleadings, proposition of law or otherwise. That being the state of the record, the Receiver is in no position to complain that he was not a party to said proceeding before the arbitration committee.

For the reasons above set forth, the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and Remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty- _____

_____

Clerk of the Appellate Court

(53761—3M—7-27)

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-seven, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JAN 9 - 1928 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 7826. Agenda No. 15.

In The

APPELLATE COURT OF ILLINOIS

Second District

October Term, A.D., 1927.

People of the State of Illinois, ex rel. Fred C. Shank, Appellee,	)	
vs.	)	Appeal from the Circuit Court Whiteside County.
The Village of Tampico and Olive Howland, Appellants.	)	

OPINION by BOGGS, J.

Appellee, on the relation of Fred C. Shank, filed a petition in the Circuit Court of Whiteside County against appellant, the Village of Tampico, praying that said village be required to remove certain obstructions alleged to be in a public alley running in an easterly and westerly direction through Block 23 in said village.

On the petition of appellant, Olive Howland, she was allowed to intervene and become a party defendant to said petition. Said petition was amended making her a party defendant, to which amended petition she filed an answer. By agreement the answer of said village to the original petition was allowed to stand to the petition as amended.

The answer of said village admitted that the premises including said block had been platted and "that there is a public alley, the width of which is unknown to this defendant, running east and west through said block 23, but denies that said alley-way was maintained twenty years ago, or ever had been dedicated and turned over to and accepted by said village for the use of the public as set forth in said petition."

Gen. No. 7526. Agenda No. 16.

In The

APPELLATE COURT OF ILLINOIS

October Term, A.D., 1927.

People of the State of Illinois, ex rel. Fred C. Mann, Appellee, vs. The Village of Tampico and Olive Howland, Appellants.	Appeal from the Circuit Court Whiteside County.

O. INLOW by BOSCH, J.

Appellee, on the relation of Fred C. Mann, filed a petition in the Circuit Court of Whiteside County against appellant, the Village of Tampico, praying that said village be required to remove certain obstructions alleged to be in a public alley running in an easterly and westerly direction through Block 23 in said village.

On the petition of appellant, Olive Howland, she was allowed to intervene and became a party defendant to said petition. Said petition was amended making her a party defendant, to which amended petition she filed an answer. By agreement the answer of said village to the original petition was allowed to stand to the petition as amended.

The answer of said village admitted that the premises including said block had been platted and "that there is a public alley, the width of which is unknown to this defendant, running east and west through said block 23; but denies that said alley-way was maintained twenty years ago, or ever had been dedicated and turned over to and accepted by said village for the use of the public as set forth in said petition."

Replications were filed to said answers, a jury was waived and a trial was had before the Court. On the hearing, the court found the issues in favor of the petitioner and entered an order directing said village to remove the obstructions from said alley-way as prayed. To reverse said judgment this appeal is prosecuted.

The evidence in the record discloses that the obstructions complained of consist of a privet hedge, a board fence and certain small buildings belonging to appellant, Olive Howland, which were encroaching on said alley, etc.

Surveys by civil engineers were caused to be made by appellee and appellants. Said engineers testified to having made surveys to obtain the north and south line of the alley in question; that they ascertained the same and that said hedge and board fence were both in said alley-way, and that certain out buildings of appellant also encroached thereon.

Snyder, the County Surveyor, made the survey for appellants. On questions propounded to him by the court, he testified that his survey showed the privet hedge, the board fence, the out buildings, etc., along the north line of lot 13 to be within said alley.

Appellant, Olive Howland, testified that she employed Snyder to determine the corners of her lot; that he erected a monument at the northeast corner thereof and that her hedge was north of the south line of said alley as located by him. She further testified that the entire north fence line was in the alley and that her buildings were encroaching on the same.

Certain plats which included the block in question, were offered in evidence by appellee and were admitted without objection on the part of appellants. These plats showed the alley in question and the location of said lots. It was stipulated that the lots belonging to appellee were twenty-five feet in width and one hundred thirty feet in depth. While certain oral testimony was heard by the court with reference to how long the board fence in question had

Replications were filed to said answers, a jury was waived and a trial was had before the Court. At the hearing, the court found the issues in favor of the petitioner and ordered an order directing said village to remove the obstructions from said alley-way as prayed. To reverse said judgment this appeal is prosecuted.

The evidence in the record discloses that the obstructions complained of consist of a privet hedge, a board fence and certain small buildings belonging to appellant, Olive Holland, which were encroaching on said alley, etc.

Surveys by civil engineers were ordered to be made by appellee and appellants. Said engineers testified to having made surveys to obtain the north and south line of the alley question; that they ascertained the same and that said hedge and board fence were both in said alley-way, and that certain out buildings of appellant also encroached thereon.

Snyder, the county surveyor, made the survey for appellees. On questions propounded to him by the court, he testified that his survey showed the privet hedge, the board fence, the out buildings, etc., along the north line of lot 18 to be within said alley.

Appellant, Olive Holland, testified that she employed [illegible] at the northeast corner thereof and then the hedge was north of the south line of said alley as located by him. The further testified that the entire north fence line was in the alley and then her [illegible].

Certain plats which included the block in question, were offered in evidence by appellee and were admitted without objection on the part of appellants. These plats showed the alley in question and the location of said lots. It was stipulated that the lots belonging to appellee were twenty-five feet in width and one hundred thirty feet in depth. While certain oral testimony was heard by the court with reference to how long the board fence in question had

been built and as to the line of travel through said alley, yet the survey, plats and stipulation conclusively show that said alley was twenty feet in width and that the privet hedge and board fence were in said alley and that the out buildings of appellant Olive Howland encroached thereon, as claimed by appellee.

Appellants insist, however, that while this may be true, appellee was not entitled to have said obstructions removed for the reason, it is charged, that the relator sold the privet hedge plants to appellant Olive Howland, and assisted her in locating the line where the same should be planted, and that said hedge as planted was an extension of the line of the board fence in question running along the north line of said lot 13.

Fred Shank, the relator denied having had anything to do with the location of the line for the planting of said privet hedge. It is not necessary to a decision of this case to consider the evidence as to whether Shank took part in the locating of said line. This being a proceeding in which the public is interested it is entitled to maintain the same, notwithstanding the relator, may not be in a position to complain. People v. Board of Education, 127 Ill. 613-626; People v. Harris, 203 Ill. 272-277; County of Pike v. People, 11 Ill. 202; People v. Emmerson, 323 Ill. 561.

In the latter case the court at page 566 says: "Finally it is suggested that relator has no such interest in this litigation as authorizes him to bring the action, but the court has repeatedly held the contrary. (Citing People v. Harris, 203 Ill. 272; County of Pike v. People, 11 Ill. 202). It is unnecessary to repeat what has already been said on the subject."

In People v. Harris, supra, the court at page 277 says:

"In a proceeding for mandamus to compel public officers to perform a duty to the public it is not necessary that the entire public join in the complaint, but they may speak or interfere through one of their citizens, the people being the real party. Nor is it necessary,

been built and up to the line of trees through said alley, but the survey, plats and stipulation conclusively show that said alley was thereby left in width and that the waived lodge and board lands were in said alley and that the new buildings of appellant Olive Howland encroached thereon, as claimed by appellee.

Appellee was not entitled to have said obstructions removed for the reason, it is charged, that the relator had the waived lodge plats to appellant Olive Howland, and assisted her in locating the line where the same should be located, and that said lodge as platted was an extension of the line of the board fence in question running along the north line of said lot 18.

Had there, the relator located in view had anything to do with the location of the line for the planting of said point lodge. It is not necessary to a decision of this case to consider the evidence as to whether there was such part in the locating of said line. This being a proceeding in which the public is interested it is entitled to maintain the same, notwithstanding the relator, may not be in a position to complain. People v. Board of Education, 247 Ill. 314-320; People v. Board, 247 Ill. 314-320; People v. Hanrahan, 246 Ill. 321-328; People v. Emerson, 246 Ill. 321.

In the latter case the court at page 328 says: "Finally it is suggested that relator has no such interest in this litigation as authorizes him to bring the action, but the court has repeatedly held the contrary. People v. Board of Education, 247 Ill. 314-320; People v. Hanrahan, 246 Ill. 321-328; People v. Emerson, 246 Ill. 321. It is unnecessary to repeat what has already been said on the subject."

In People v. Hanrahan, supra, the court at page 327 says:

"In a proceeding for mandamus to compel public officers to perform a duty to the public it is not necessary that the relator, public in the complaint, but they may act or informers through one of their citizens, the people being the real party. Nor is it necessary

in this kind of proceeding, for a relator to show that he has any legal interest in the result of the suit, as it is prima facie the duty of the mayor and city council to keep the streets free from all obstructions and the power is granted to be exercised for the public benefit, and its execution can be insisted on as a duty. (Citing Hall v. People ex rel. 57 Ill. 307.)"

It is next insisted by counsel for appellants that the writ of mandamus is not a writ of right and that the court was without authority to grant such writ in this case, for the reason that to do so would be to establish a disputed boundary line. What we have already said with reference to the south boundary line of said alley being along the north line of lot 13 sufficiently disposes of this question. The premises in question including said block 23 had been regularly platted and the alley in question was laid out therein and its location and dimensions were certain. While through the neglect of the village authorities said alley-way may have become obstructed that fact would not render uncertain its exact location for it was a line that could be determined clearly by engineers as was done in this case. This was therefore not a proceeding to determine a disputed line. It is the duty of a city or village to keep its streets and alleys free from obstructions and such duty may be compelled by mandamus proceedings. People v. Harris, 203 Ill. 272-277; People v. Corn Products Co., 286 Ill. 226-231; People v. Western Storage Co., 287 Ill. 612-618; Brokew v. Commissioners of Highways, 130 Ill. 482.

The testimony on the part of the village authorities in this case as well as the answer above quoted clearly discloses there was an alley through block 23 and that it was being used by the public. The village authorities therefore are not in a position to maintain their contention that said village did not accept the dedication of said alley. The streets that were laid out at the time the premises which included block 23 were platted had been accepted and used by said village. It would therefore be presumed that all of the streets and alleys were accepted in the absence of anything showing the

in this kind of proceeding, for a holder to show that he has any legal interest in the result of the suit, or it is prima facie the duty of the mayor and city council to vacate the alleyde line from all [illegible] and the [illegible] be insulated or as a duty. (Olivine Hall v. People ex rel. 87 Ill. 202.)

It is much insisted by counsel for appellants that the [illegible] of [illegible] authority to grant such suit in this case, for the reason that to do so would be to establish a disputed boundary line. That we have already said with reference to the north boundary line of said alley being along the north line of lot 18 sufficiently disposes of this question. The premises in question including said block 22 are been regularly platted and the alley in question was laid out therein and its location and dimensions are certain. While through the rights of the village authorities said alley-way may have become obstructed that fact would not render uncertain its exact location nor it was a time that could be determined clearly by engineers as was done in this case. This was therefore not a proceeding to determine a disputed line. It is the duty of a city or village to keep its streets and alleys free from obstructions and such duty may be compelled by [illegible] (People v. [illegible] 200 Ill. 386-392; People v. Indian Orchard Co., 287 Ill. 612-618; Brooks v. Commissioners of Highways, 180 Ill. 72.)

The testimony on the part of the village authorities in this case as well as the answer above quoted clearly discloses there was an alley through block 22 and that it was being used by the public. The village authorities therefore are not in a position to maintain their contention that said village did not accept the dedication of said alley. The records show that were laid out the streets and alleys which included block 22 were platted and been recorded and used by said village. It would therefore be unusual that all of the streets and alleys were accepted in the absence of anything showing the

acceptance to have been limited. Village of Lee v. Harris, 206 Ill. 428-440; Kimball v. City of Chicago, 255 Ill. 105-112. There is nothing in this case to show that the village authorities eliminated said alley from their acceptance of said dedication.

Counsel for the appellants also urge that the board fence in question had been standing in its present location for more than twenty years which would be a sufficient reason for denying the relief prayed. This point is not well taken. Mere adverse possession of lot owner of a portion of a public street, however long continued, does not bar the right of the public to be restored to possession of the street to its full width. City of DeKalb v. Luney, 193 Ill. 185-189; Shirk v. City of Chicago, 195 Ill. 208-213; Russell v. City of Lincoln, 200 Ill. 511-522.

Counsel also insist that said village has allowed appellant, Olive Howland, to plant said privet hedge and otherwise encroach on said alley without objection. Improvements of the character here shown to have been made even if knowingly acquiesced in are not of a character to estop a city or village from repossessing itself of that portion of the street or alley which may have been encroached upon. City of DeKalb v. Luney, 193 Ill. 185-191; Russell v. City of Lincoln, 200 Ill. 511-522.

We are of the opinion and hold that the court was fully warranted in granting the relief prayed.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.

acceptance to have been limited. Village of Lee v. Marvin, 300 Ill. [illegible]; Cooper v. City of Chicago, [illegible] Ill. [illegible]. Nothing in this case to show that the village authorities eliminated said alley from their acceptance of said dedication.

Counsel for the appellants also urge that the board lacks authority [illegible] in this proceeding, which would be a sufficient reason for denying the relief prayed. This point is not well taken. Here adverse possession of lot owner of a portion of a public street, however long continued, does not bar the right of the public to be restored to possession of the street; [illegible] City of Chicago v. [illegible], [illegible] Ill. [illegible]; [illegible] v. [illegible], [illegible] Ill. [illegible]; [illegible] v. Lincoln, 300 Ill. 321-328.

Counsel also insist that said village has allowed appellant, Olive Howland, to plant trees, place hedge and otherwise encroach on said alley without objection. Improvements of the appellee have shown to have been made over it knowingly acquiesced in are not of a character to estop a city or village from repossessing itself of that portion of the street or alley which may have been encroached upon. Village of Lockport v. [illegible], [illegible] Ill. [illegible]; [illegible] v. [illegible], [illegible] Ill. [illegible].

We are of the opinion and hold that the court was fully warranted in granting the relief prayed.

Finding no reversible error in the record, the judgment of the trial court is affirmed.

Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and twenty-_____

_____

Clerk of the Appellate Court

(53761—3M—7-27)

abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-seven, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 7845 Agenda No. 30

In The

APPELLATE COURT OF ILLINOIS,

Second District

October Term, A. D., 1927.

BRITISH AMERICA ASSURANCE COMPANY, a corporation, Appellee,	Appeal from Circuit Court Peoria County.
vs.	
ILLINOIS UNDERWRITERS CORPORATION, a corporation, Appellant.	

OPINION By BOGGS, J.

An action on the case was instituted by appellee against appellant in the circuit court of Peoria county to recover the amount paid in settlement for a loss on an insurance policy issued by appellant as the agent of appellee.

The declaration consists of two counts and charges that on September 29, 1924, appellant, as the agent of appellee, executed an automobile insurance policy to one Tom McCarthy, indemnifying him to the extent of $1,500 against fire, theft, etc., on a Studebaker automobile; that on October 7th and 16th appellee notified appellant in writing to cancel said policy, and that it failed so to do; that on November 8, while said policy was still in force, said automobile was stolen, and that appellee was compelled to pay to the insured in settlement of said loss $967.80, etc.

To said declaration appellant filed a plea of the general issue. A trial was had, resulting in a verdict and judgment in favor of appellee in the sum of $400. To reverse said judgment, this appeal is prosecuted.

General No. 7818 Agenda No. 80

In The

AMERICAN COURT OF INDUSTRY,

October Term, A. D., 1927.

BRITISH AMERICA ASSURANCE COMPANY, a corporation, Appellee, vs. [illegible] a corporation, Appellant.	Appeal from Circuit Court Peoria County.

OPINION BY [illegible], J.

An action on the case was instituted in appellee against appellant in the circuit court of Peoria county to recover the amount paid in settlement for a loss on an insurance policy issued by appellant as the agent of appellee.

The declaration consists of two counts and charges that on September 29, 1924, appellant, as the agent of appellee, executed an automobile insurance policy to one Tom Moberly, indemnifying him to the extent of $1,500 against fire, theft, etc., on a Chevrolet automobile; that on October 7th and 16th appellee notified appellant in writing to cancel said policy, and that it failed so to do; that on November 8, while said policy was still in force, said automobile was stolen, and that appellee was compelled to pay to the insured in settlement of said loss $907.80, etc.

To said declaration appellant filed a plea of the general issue. A trial was had, resulting in a verdict and judgment in favor of appellee in the sum of $860. To reverse said judgment, this appeal is prosecuted.

The record discloses that appellant is engaged in the insurance business, at Peoria, Illinois; that during the year 1924, up to November 15th, it was acting as agent for appellee in issuing policies upon automobiles. When a policy of appellee company was issued by appellant, a daily report thereof was sent by mail to appellee at its place of business in Freeport, Illinois. F. M. Gund is the manager for appellee in its western department, having headquarters at Freeport, and has authority over all local and state agents of said company. In the transaction of business between appellant and appellee, appellant from time to time, on the direction of appellee, would take up and cancel policies and return the same to appellee at Freeport. On September 24, 1924, appellant issued a policy in appellee company to one Tom McCarthy, whose occupation was given as an iron worker. Said policy was in the sum of $1,500 and was written to cover loss or damage by theft, robbery or pilferage, etc. On October 7, F. M. Gund wrote appellant the following letter:

"Re: Policy No. 330--Tom McCarthy.

"Referring to this risk, will you kindly cancel the policy. We have a very unfavorable report regarding the assured in which it is stated that he is at present out on bond pending trial for the transportation of liquor by his car. It is needless to say that we cannot continue the policy in force and effect and would ask you to kindly send it to us at a very early date."

Thereafter, on October 16, 1924, he again wrote appellant concerning this policy and others as follows:

"Referring to the above risks, we note that these are the policies which we have requested cancellation of. Our Mr. Davis has advised us that you would comply with our request and send in the policies themselves. We have not received them and if they are not received within five days we will consider that we have no other alternative in the matter than to serve direct notice of cancellation on each one of these assureds by registered mail. We always

The second difficulty that occurred is stated in the [illegible] business, at Peoria, Illinois, that during the year 1921, up to November 15th, it was making an effort for operation in issuing policies upon automobiles. Upon a notice of cancellation company was issued by applicant, a daily report showing work by week to applies at its place of business in Freeport, Illinois. [illegible] that the manager for applies in the summer department, having headquarters at Freeport, was authorizing over all local and state agents of said company. In the transaction of business between applicant and applies, complaint from [illegible] in the direction of applies, would turn up and cancel policies and return the same to applies at Freeport. In September 26, 1921, applicant issued a policy to applies company to one Tom Doherty. Such cancellation was given as an iron warrant. Said policy was in the amount of 1,000 and was written to cover loss or damage by theft, robbery or pilferage, etc.

"Referring to this matter, will you kindly amend the policy. We have a very unfavorable report regarding the company in which it is stated that it is at present not in good standing with for the transportation of liquor by his car. It is needless to say that we cannot continue the policy in force and effect and would ask you to cancel your [illegible]."

Thereafter, on October 16, 1922, he again wrote applicant concerning this policy and answer as follows:

"Referring to the above claim, we note that there are the policies which we have re-special cancellation of. [illegible] the policies themselves. We have not received the [illegible] not received within five days we will consider that we have no other alternative in the matter than to serve direct notice of cancellation on each one of those assured by registered mail. [illegible]

prefer to take these matters up through our agent and hope that you will give the cancellations your attention, sending us the policies immediately. Thanking you for this favor, we remain" etc.

Thereafter, on November 8, 1924, said automobile was stolen. Proofs of loss were made, and said loss was adjusted with the insured for $967.70.

It is first contended by appellant that the court erred in its rulings on the evidence.

On the trial of said cause, appellant offered testimony to the effect that after receiving said letters the matter was discussed with one C. W. Davis, state agent for appellee, and that Davis directed appellant not to cancel said policies until they received authority from him.

The record shows that Davis was appointed by and acting under the direction of F. M. Gund. Davis testified as a witness for appellant that his duties were never clearly defined, "It was sort of general blanket authority. I was appointed by Mr. Gund as state agent for the companies of which he was manager, and of which the British-America Assurance was one of them, and those duties were to appoint agents for all the companies of which Mr. Gund was manager; to look after the business generally in the state; to make inspections, make collections, and such other matters as came up in connection with the business. I inspected risks; there were times we inspected risks when agents would request us to inspect, to see whether they would be acceptable to the company. * * * I had authority to hire and discharge local agents." On cross examination he testified: "As such agent, I selected agents, and then reported to the offices at Freeport."

According to Davis' testimony, he was appointed by and acting under the direction of Gund. While he testified that his duties were of a general supervisory character, and that they were

prefer to take these matters up through our agent and have that you will give the cancellations your attention, sending us the policies immediately. Thanking you for this favor, I remain" etc.

Thereafter, on November 8, 1924, said automobile was stolen. Proofs of loss were made, and said loss was adjusted with the insured for $987.10.

It is first contended by appellant that the court erred in its findings on the evidence.

On the trial of said cause, appellant offered testimony to the effect that after receiving said letters the matter was discussed with one G. E. Davis, stole agent for appellee, and that Davis directed appellant not to deposit said policies until the insured authorized them.

The record shows that Davis was appointed by and acting under the direction of F. M. Gund. Davis testified as a witness for appellant that his duties were never clearly defined. "It was sort of general blanket authority. I was appointed by Mr. Gund as state agent for the companies of which he was manager, and of which the British-America Assurance was one of them, and those duties were to appoint agents for all the companies of which Mr. Gund was manager; to look after the business generally in the state; to make inspections, make collections, and such other matters as came up in connection with the business. I inspected risks; there were times we inspected risks when agents would request me to inspect, to see whether they would be acceptable to the company. * * * I had authority to hire and discharge local agents." On cross examination he testified: "My such agent, I selected agents, and then reported to the officers at headquarters."

According to Davis' testimony, he was appointed by and acting under the direction of Gund. While he testified that his duties were of a general supervisory character, and that he was

indefinite, in specifying his duties he did not include authority to abrogate or set aside or supervise the orders sent from the head office at Freeport. The court did not err in refusing to admit this testimony. Appellee's directions to appellant to cancel said policy were specific and unequivocal, and there was no occasion for taking up the matter of what should be done with any subordinate agent. Germania Fire Ins. Co. v. [illegible], [illegible]; [illegible] v. [illegible], 96 App. 405; Dazey v. Roleau, Ill. App. 367-369.

It is next contended by appellant that appellee was guilty of contributory negligence. In this connection counsel contend that appellee, having written the letter of October 16th, stating that if said policy and others "are not received within five days, we will consider that we have no other alternative in the matter than to serve direct notice of cancellation"; that, after October 21st, appellant had no further duty in connection with said matter, and that appellee was negligent in failing to cancel said policy.

There is no merit in this contention. Appellee had the right to assume that appellant would carry out its instructions, and appellant is not in a position to claim that appellee was negligent. Appellee was not required to anticipate that appellant would negligently fail to cancel said policy as directed. Kittier, Admx., etc. v. C. & W. I. R. Co., 203 App. 439-440.

It is next contended by counsel for appellant that the verdict of the jury is against the manifest weight of the evidence. That appellant received the two letters in question, is conclusively shown by the record. That being true, it became its duty to at once take up and cancel said policy. Failing so to do, it would be liable for the consequential damages, if any. Germania Fire Ins. Co. v. Heideman, supra; [illegible] v. [illegible], supra; [illegible] v. [illegible], supra; American Ins. Co. v. [illegible], 203 [illegible] 166; [illegible] Co. v. Russell, 1 Pa. Sup. Ct. 320. The verdict is not against the weight of the evidence, but is supported by the clear preponderance thereof.

It is next contended that the court erred in giving the second, fifth and sixth instructions given on behalf of appellee, for

indemnity, in accepting the policy [illegible] insurance company to advance or lay aside or surrender the [illegible] from the insured office at Freeport. The court did not err in refusing to admit this testimony. Appellee's directions to appellant to cancel said policy were specific and unequivocal, and there was no occasion for taking up the matter of what should be done with any subrogation agent. Hermanie Elec. Co., 21, v. [illegible], [illegible] Sup. Ct. [illegible] 89 Ky. 4007 [illegible] v. Gibson, 111. App. 407-408.

It is next contended by appellant that appellee was guilty of contributory negligence. In this connection counsel contend that appellee, having written the letter of October 10th, stating that if said policy and others "are not received within five days, we will consider that we have no other alternative in the matter than to serve direct notice of cancellation"; that, after October 21st, appellant had no further duty in connection with said matter, and that appellee was negligent in failing to cancel said policy.

There is no merit in this contention. Appellee had the right to assume that appellant would carry out its instructions, and appellant is not in a position to claim that appellee was negligent. Appellee was not required to anticipate that appellant would negligently fail to cancel said policy as directed. Kittler, Adm., etc. v. [illegible] Co., [illegible] 41.

[illegible]

verdict of the jury is against the manifest weight of the evidence. That appellant received the two letters in question, is conclusively shown by the record. That being true, it became its duty to at once take up and cancel said policy. Failing so to do, it would be liable for the consequential damages, if any. Hermanie Elec Ins. Co. v. [illegible] Burg. Guardian [illegible] v. [illegible]; American Ins. Co. v. Martinek, 208 Ill. 108; London Assurance Co. v. Mussell, 1 Ia. App. 64, 320. The verdict is not against the weight of the evidence, but is supported by the clear preponderance thereof.

It is next contended that the court erred in giving the [illegible] and sixth instructions, given on behalf of appellee. For

the reason that they do not require proof of due care. Counsel apparently hold to the theory that the same rules obtain in this character of case as in a personal injury suit, and the cases cited by them as supporting their contention are cases of that character. Counsel's position in this connection is erroneous, and is not supported by the authorities.

No instructions were offered by appellant, with the exception of an instruction as to the form of the verdict. If appellant's theory of the case was not presented to the jury, it was its own fault, and it is not now in a position to complain. Osgood v. Skinner, 211 Ill. 229-240; People v. Lucas, 244 Ill. 603-614; People v. Harrison, 318 Ill. 316-320.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

_____
Clerk of the Appellate Court

(53761—3M—7-27)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-seven, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JAN 2 [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 7861 Agenda No. 39.

In The

APPELLATE COURT OF ILLINOIS,

Second District.

October Term, A. D. 1927.

HENRY FRITZINGER, Appellant,	)	
vs.	)	Appeal from Circuit Court, Woodford County.
MICHAEL HALDENMAIER, Appellee.	)	

OPINION by BOGGS, J.

Appellant filed a bill for injunction in the circuit court of Woodford County, alleging that he was the owner of some 160 acres of land, lying west of a certain public road in said county, "on which there is a dwelling house, located about thirty-five or forty feet from said public road; that said premises is leased to Louis Fritzinger, who farms said land and lives in said dwelling house with his family, consisting of himself, his wife and one child aged six years"; that said road is one of the principal highways in said county, and is 54 feet wide; that across said road to the east, appellee owns and farms eighty acres of land, with a frontage of a quarter of a mile along said road; that appellee maintained a feed shed on said premises, located about fifty feet back from said public road and opposite the dwelling house of appellant; that said shed was destroyed in May, 1925, by a windstorm; that thereupon appellant notified appellee not to rebuild the same on its former location "because it would be obnoxious and unhealthful to the tenants of your orator." That, regardless of said notice, appellee rebuilt said feed barn within fifty feet of his line fence, and directly opposite the

In the

AP. DIRECT COURT OF ILLINOIS,

Second District.

October Term, A. D. 1927.

HENRY FRITZINGER, Appellant,	
vs.	Appeal from Fourth District, Woodford County.
MICHAEL K. FRITZINGER, Appellee.	

OPINION by MOORE, J.

Appellant filed a bill for injunction in the circuit court of Woodford County, alleging that he was the owner of some 160 acres of land, lying west of a certain public road in said county, "on which there is a dwelling house, located about thirty-five or forty feet from said public road; that said premises is leased to Louis Fritzinger, who farms said land and lives in said dwelling house with his family, consisting of himself, his wife and one child aged six years"; that said road is one of the principal highways in said county, and is 24 feet wide; that across said road to the east, appellee owns and farms eighty acres of land, with a frontage of a quarter of a mile along said road; that appellee maintained a feed shed on said premises, located about fifty feet back from said public road and opposite the dwelling house of a neighbor; that said shed was destroyed in May, 1926, by a windstorm; that thereupon appellant notified appellee not to rebuild the same on its former location "because it would be obnoxious and unbearable to the tenants of your owner." That, regardless of said notice, appellee rebuilt said shed within fifty feet of his line fence, and directly opposite the

dwelling house of appellant; that said feed lot consisting of about one-half acre of ground was within ninety feet of the premises of appellant; that in said lot are fed some thirty-five to forty head of steers and about that many hogs; "that the stench from the said feed barn aforesiad is obnoxious and a menace to the health of the tenants of your orator; that the said defendant does not remove the manure from siad feed barn or feed lot more than once a year, that the bellowing of the steers during the hours of the night interferes with the rest and peaceful enjoyment of the premises of your orator by your orator's tenants; *** that your orator *** requested that he move the said cattle to a place on his said premises more remote, but that the said defendant has refused to do so, and still refuses to do so;" that appellant complained to the supervisor of said township, to the state's attorney of said county, and to the State Board of Health; that an investigation was made by the State Board of Health by one of its engineers, and that he reported that "the conditions were unbearable and that it was a menace to the health of the tenants of your orator;" that if appellee continues to maintain said feed barn where it is now located, irreparable injury will result to appellant "by the threatened cancellation of the lease by his tenants, and that the property of your orator has been greatly depreciated in fact and that if the grievances above complained of are permitted to continue, his property will still further depreciate in fact;" that appellant would be compelled to abandon the use of the said dwelling house as an abode for his tenants; that when the weather is warm said lot gives forth a "strong stench;" that appellee's cattle "by their actions, are a nuisance not only to your orator and his tenants, but to the people passing along the public highway, by reason of the said cattle riding one another."

Said bill prays that appellee and all persons in privity under him may be perpetually enjoined by injunction from using the said feed lot and maintaining the same as a nuisance.

dwelling house of a plaintiff; that said feed lot consisting of about one-half acre of ground was within ninety feet of the premises of appellant; that in said lot are fed some twenty-five to forty head of steers and about [illegible] head many more; "that the manure from the said feed barn already is obnoxious and a menace to the health of the tenants of your orator; that the said defendant does not remove the manure from said feed barn or feed lot more than once a year, that the bellowing of his steers during the hours of the night interferes with the rest and peaceful enjoyment of the residence of your orator by your orator's tenants; ***that your orator ***requested that he move the said cattle to a place on his said premises more remote, but that the said defendant has refused to do so; and still refuses to do so;" that appellant complained to the supervisor of said township, to the sanitary attorney of said county, and to the State Board of Health; that an investigation was made by the State Board of Health by one of its engineers; and that he reported that "the conditions were unbearable and that it was a menace to the health of the tenants of your orator;" that it appears desirable to maintain such feed barn where it is now located, irreparable injury will result to complainant "by the unwarranted annoyation of the tenants by the tenants, and that the property of your orator has been greatly depreciated in that and that if the grievances above complained of are continued to continue, his property will still further depreciate in fact;" that complainant would be compelled to abandon the use of the said dwelling house as a home for his tenants; that upon the weather is from said lot arises such a "strong stench;" that appellee's lawful and by their actions, are a nuisance not only to your orator and his tenants, but to the people passing along the public highway, by reason of the said cattle yielding one stench."

The bill prays that appellee and all persons in privity under him may be perpetually enjoined by injunction from using the said feed lot and maintaining the same as a nuisance.

An answer was filed admitting the ownership and occupancy of the respective premises as set forth in said bill. While admitting the maintenance of a feed lot adjoining said public road, said answer denies that the same is in close proximity to the dwelling house of appellant, and avers that the easterly line of said lot is about 167 feet from said dwelling house, and that said feed barn complained of is about 286 feet east thereof. Said answer further denies that said barn and feed lot is obnoxious and a menace to the health of appellant's tenants; denies that appellee does not remove the manure from said barn more than once a year, denies that the bellowing of the steers interferes with the rest, etc., of the tenants of appellant; denies that the actions of said cattle are a nuisance to appellant's tenants, or to the people passing along the highway. Said answer admits that appellant notified appellee not to rebuild his feed barn and avers that he removed the feed boxes, to the east side of said barn, and had maintained the same there since said time, etc.

The cause was referred to the master to take the evidence and to report the same, together with his conclusions of law and fact. The master took and reported the evidence to the court, and found and reported that appellant had failed to prove his bill, and recommended the dismissal of said bill for want of equity. Objections were filed to the report of the master, which were overruled, and exceptions were filed thereto. The court overruled the exceptions, approved the report of the master, and dismissed said bill for want of equity. To reverse said decree, this appeal is prosecuted.

While the evidence in the record is somewhat conflicting, it tends to show that appellee fed about a carload of cattle each year, beginning about the first of November or December, and running through to about the first of May; that with said cattle, he also fed hogs; that the feeding operations so conducted were such as are ordinarily

[illegible]

of the respective premises as set forth in said bill. While admitting the maintenance of a feed lot adjoining said public road, said owner denies that the same is in close proximity to the dwelling house of appellant, and avers that the nearest line of a lot is a lot or about 100 feet from said dwelling house, and that said feed barn constructed is about 286 feet east thereof. Said owner further denies that said barn and feed lot is obnoxious and a menace to the health of appellant's tenants; denies that appellee does not remove the manure from said barn more than once a year, denies that the bellowing of the steers interferes with the rest, etc., of the tenants of appellant; denies that the actions of said owner are a nuisance to appellant's tenants, or to the people passing along the highway. Said owner admits that appellant notified appellee not to rebuild his feed barn and avers that he removed the feed house, to the east side of said barn, and had maintained the same there since said time, etc.

The cause was referred to the master to take the evidence and to report the same, together with his conclusions of law and fact. The master took and reported the evidence to be as stated, and found and reported that appellant had failed to prove his bill, and recommended the dismissal of said bill for want of a right. Objections were filed to the report of the master, which were overruled, and exceptions were filed thereto. The court overruled the exceptions, and approved the report of the master, and dismissed said bill for want of a right. To [illegible] this appeal is [illegible].

While the evidence in the record is somewhat conflicting, it tends to show that appellee had above a capacity of about eight years, beginning about the first of November or December, and running through to about the first of May; that with said cattle, he also had hogs; that the feeding of cattle so conducted were such as are ordinarily

conducted by stockmen. The evidence wholly fails to support the allegation of appellant's bill to the effect that the odors from said lot were unhealthful, or that appellant's tenant, his wife or daughter, were ever sick by reason thereof. The evidence also fails to support the allegation to the effect that the operation of said feed lot was depreciating the value of appellant's premises, or the allegation that appellant's son, his tenant, was threatening to leave said premises.

The supervisor of said township and several of the neighbors testified on the hearing. Their evidence tended to show that the odors from said lot were such as ordinarily come from feed lots. On complaint by appellant to the State Board of Health an engineer was sent to inspect appellee's premises. He testified: "I noticed the odor along the road, yes, sir. The day I was there it was inclined to be warm and very little wind. There were manure and pools of urine about the premises in this lot, that is, where the cattle were. * * * This condition would cause a bad odor to arise from this particular pen." On inquiry of this witness as to whether the condition of the lot would be detrimental to the health of the tenants of appellant, he answered: "Maybe, inasmuch as it constitutes a breeding-place for flies and mosquitoes, which carry diseases. Some might be nauseated from the odors, but I would not be. It was an offensive odor."

The testimony on the part of appellant's son, Louis Fritzinger, tenant on said premises, was to the effect that appellee was allowing cattle to breed in said lot, where it could be seen from his home and from said public highway. On cross examination it developed that nothing like that had occurred for more than five years prior to the filing of said bill. While there was some evidence with reference to the steers jumping on one another, there was nothing to show that that was any different from what ordinarily obtains with a bunch of cattle. The evidence also fails to show that the bawling of the cattle in said lot was in any way unusual.

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The supervisor of said township and several of the neighbors testified on the hearing. Their evidence tended to show that the odors from said lot were such as ordinarily come from feed lots. On complaint by appellant to the State Board of Health an engineer was sent to inspect appellee's premises. He testified: "I noticed the odor along the road, yes, sir. The day I was there it was inclined to be warm and very little wind. There were manure and pools of urine about the premises in this lot, that is, where the cattle were. * * * This condition would cause a bad odor to arise from this particular pen." On inquiry of this witness as to whether the condition of the lot would be detrimental to the health of the tenants of appellant, he answered: "Maybe, inasmuch as it constitutes a breeding-place for flies and mosquitoes, which cause diseases. Some might be nauseated from the odors, but I would not be. It was an offensive odor."

The testimony on the part of appellant's son, Louis Fritzinger, tenant on said premises, was to the effect that appellee was allowing cattle to bunch in said lot, where it could be seen from his home and from said public highway. On cross examination it developed that nothing like that had occurred for some three five years prior to the filing of said bill. While there was some evidence with reference to the odors burning on one occasion, there was nothing to show that that was any different from what ordinarily obtains with a bunch of cattle. The evidence also fails to show that the bawling of the cattle in said lot was in any way unusual.

The evidence on the part of appellee is to the effect that the accumulating manure in and around said shed was hauled out some five or six times during the course of a year.

"Courts of equity will grant an injunction to restrain a public nuisance only in cases where the fact is clearly made out upon determinate and satisfactory evidence, for, if the evidence be conflicting and the injury to the public doubtful, that alone will constitute a ground for withholding the extraordinary interposition. * * * The same doctrine is equally applicable to cases of private nuisance." 2 Story's Eq. Juris, 13th ed., sec. 924a. To the same effect is 2 Joyce on Injunctions, secs. 1064-1065; 2 Wood on Nuisances, 3d ed., sec. 786; 1 High on Injunctions, 3d ed. sec. 740; City of Pana v. Washed Coal Co., 260 Ill. 111-122.

As a general rule, a court of equity will not interfere to restrain a nuisance until the right so to do is first established in a court of law. This rule, however, has been somewhat relaxed in modern times, and when the case is clear, so as to be free from substantial doubt as to the right to relief, or it is evident that a nuisance per se exists, equitable relief may be granted without first resorting to an action at law. Village of Dwight v. Hayes, 150 Ill. 273; 1 High on Injunctions, 3d ed., sec. 748; City of Pana v. Washed Coal Co., supra, 124.

The business of feeding cattle in the country districts is not per se a nuisance. In discussing the matter of noises, odors, etc. the supreme court in City of Pana v. Washed Coal Co., supra, at page 126 says:

"Where it is sought to restrain by injunction, the prosecution of a business or vocation, lawful in itself, on the ground that it is obnoxious to the health, comfort or convenience of the neighborhood by reason of disagreeable noises, offensive odors, noxious gases and the like, no general rule can be laid down sufficiently specific and certain tp apply to all cases, but each case must be tried upon its own peculiar facts, the whole question being one largely of

The evidence on the point of qualifies in to the effect

[illegible]

"Courts of equity will grant an injunction to restrain a public nuisance only in cases where the fact is clearly made out upon determinate and satisfactory evidence, for, if the evidence is conflicting and the injury to the public doubtful, that alone will [illegible] a ground for withholding the [illegible]. The same doctrine is equally applicable to cases of private nuisance." [illegible] Co., Ltd., 1894 ed., sec. [illegible]. To the same effect is 2 [illegible] sec. 708; 1 High on Injunctions, 4th ed. sec. 710; [illegible] v. [illegible] Co., [illegible].

In a general rule, a doubt of equity will not interfere to restrain a nuisance until the right on the [illegible] has been established in a court of law. This rule, however, has been considerably relaxed in modern times, and when the case is clear, so as to be free from substantial doubt as to the right to relief, or it is evident that a [illegible] resorting to an action at law. Village of [illegible] v. [illegible], 180 Ill. 276; 1 High on Injunctions, 3d ed., sec. 756; [illegible] v. [illegible] Coal Co., supra, 124.

The business of feeding cattle in the country distributes in not per se a nuisance. In discussing the [illegible] [illegible], etc. [illegible] v. [illegible], 112 [illegible]:

"Where it is sought to enjoin by injunction, the maintenance of a business or occupation, lawful in itself, on the ground that it is obnoxious to the health, comfort or convenience of the neighborhood by reason of disagreeable odors, offensive odors, noxious gases and the like, no general rule can be laid down sufficiently specific and certain to apply to all cases; but each case must be tried upon its own peculiar facts, the main question being one largely of

degree, to be determined in the light of human experience. (2 Wood on Nuisances, sec. 801.) * * * If it is so offensive as to materially interfere with ordinary physical comfort, measured not by the standards of persons of delicate sensibilities and fastidious habits, but by the habits and feelings of ordinary people, then a remedy by injunction may be granted." Citing Wahle v. Reinbach, 76 Ill. 322; Wente v. Commonwealth Fuel Co., 232 Ill. 526-[illegible]. To the same effect is Phelps v. Winch, 309 Ill. 158-162; Oehler v. Levy, 264 Ill. 395-401.

The proof in this case is not of that conclusive or satisfactory character, necessary to give a court of equity jurisdiction to enjoin the business carried on by appellee as a nuisance, without first having the existence of such nuisance established in a court of law. On the contrary, the weight of the evidence is to the effect that appellee is not maintaining a nuisance.

It may also be observed in this case that the barn of appellant is nearer to the dwelling house in question than is the feeding shed of appellee. The evidence also discloses that appellant hauls to his own premises and piles manure back of his barn, which is as near or nearer to appellant's dwelling house than said feed shed. While this does not tend to prove or disprove the issues in this case, it is a matter to be considered in determining the good faith of appellant in prosecuting said bill.

We are further of the opinion that the finding of the master to the effect that appellant failed to prove the allegations of his bill, is supported by the evidence. The court therefore did not err in dismissing said bill.

For the reasons above set forth, the decree of the trial court, dismissing said bill for want of equity, will be affirmed.

Decree affirmed.

degree, to be determined in the light of human experiences. (2 Wood on Nuisances, sec. 801.) " " " If it is so offensive as to materially interfere with ordinary physical comfort, measured not by the standards of persons of delicate sensibilities and fastidious habits, but by the habits and feelings of ordinary people, then a remedy by injunction may be granted." Utting Table v. Reinecke, 76 Ill. 322; Monte v. Commonwealth Heat Co., 232 Ill. 386-392. To the same effect is Holmes v. Hinch, 229 Ill. 156-162; Gehlmer v. Levy, 224 Ill. 396-401.

The proof in this case is not of that conclusive or satisfactory character, necessary to give a court of equity jurisdiction to enjoin the business carried on by appellee as a nuisance, without first having the existence of such nuisance established in a court of law. On the contrary the weight of the evidence is to the effect that appellee is not maintaining a nuisance.

It may also be observed in this case that the home of appellant is nearer to the dwelling house in question than is the feeding shed of appellee. The evidence also discloses that appellant hauls to his own premises and pile manure back of his barn, which is as near or nearer to appellant's dwelling house than said feed shed. While this does not tend to prove or disprove the issues in this case, it is a matter to be considered in determining the good faith of appellant in prosecuting said bill.

We are further of the opinion that the finding of the master to the effect that appellant failed to prove the allegations of his bill, is supported by the evidence. The court therefore did not err in dismissing said bill.

For the reasons above set forth, the decree of the trial court, dismissing said bill for want of equity, will be affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal ot said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and twenty-_____

_____

Clerk of the Appellate Court

(53761—3M—7-27)

abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-seven, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JAN 30 1928 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 7855.

Agenda No. 36

I. No

APPELLATE COURT OF ILLINOIS

Second District

October Term, A. D. 1927.

B. L. HULSEBUS, Appellant,

vs.

C. J. SAMMIS, Appellee.

Appeal from the Circuit Court of Peoria County.

OPINION by BOGGS, J.

A bill was filed by appellant against appellee and one William J. Wickert in the circuit court of Peoria county to foreclose an alleged mechanic lien. As finally amended, said bill alleged that appellant was a licensed architect; that on or about April 15th, 1925 Raymond H. Portman applied to him, on behalf of appellee, "to perform architectural services, for drawing plans, preparing specifications and other architectural services for the construction by said defendants of a certain warehouse and cold storage building" on certain lots in the City of Peoria, owned by appellee; that a verbal contract was entered into between appellant and the said Raymond H. Portman and one Lawrence B. Portman, for and on behalf of appellee and said Wickert, "for drawing plans, preparing specifications and other architectural services incidental thereto, necessary for the construction of said warehouse and cold storage building * * * to be completed on or before the 30th day of September, 1925, ready for the use of said defendants for the purpose of letting contracts * * *, upon bids received by your orator from various contractors for the construction of said warehouse and cold storage building * * *, and it was agreed by the parties hereto in said verbal contract that your orator would * * * do all the

Gen. No. 7026.

In the

Circuit Court of Cook County,

Second Division.

B. I. HUBENDUBL,

appellee,

v.

G. J. SAUNDS,

appellee.

Appeal from the Circuit Court of Peoria County.

OPINION by HODGES, J.

A bill was filed by appellant against appellee and one William J. Wickert in the circuit court of Peoria county to foreclose an alleged mechanic lien. As finally amended, said bill alleged that appellant was a licensed architect; that on or about April 16th, 1920 Raymond H. Lorkman applied to him, on behalf of appellee, "to perform architectural services, for drawing plans, preparing specifications and other architectural services for the construction by said defendants of a certain warehouse and cold storage building" on certain lots in the City of Peoria, owned by appellee; that a verbal contract was entered into between appellant and the said Raymond H. Lorkman and one Lawrence H. Lorkman, for and on behalf of appellee and said Wickert, "for drawing plans, preparing specifications and other architectural services including structural drawings, necessary for the construction of said warehouse and cold storage building * * * to be completed on or before the 30th day of September, 1920, ready for the use of said defendants for the purpose of letting contracts * * *, upon bids received by said defendants from various contractors for the construction of said warehouse and cold storage building * * *", and it was agreed by the parties hereto in said verbal contract that your answer would * * * to all the

necessary work and services as an architect for the said warehouse and cold storage building * * *, and that the said premises were to be conveyed to the Central Warehouse and Cold Storage Company, a company to be incorporated of the city of Peoria, Illinois, by the said C. J. Sammis, William J. Wickert and others, and that your orator agreed to perform said services, furnishing plans and specifications therefor, for two and one-half per cent ($2\frac{1}{2}\%$) of the cost of said warehouse and cold storage building, the cost of which was to be obtained through bids received by your orator, and which said bids were received, totaling $341,900 for the construction of said warehouse and cold storage building in accordance with said plans and specifications as prepared by your orator for said defendants, and that the said payment of two and one-half per cent ($2\frac{1}{2}\%$) of the cost of said warehouse and cold storage building was to be paid to your orator by the said defendants when the said bids were received by your orator, and that said bids were received by your orator on September 30th, 1925."

Said bill further avers "that the said defendants agreed to pay an additional two and one-half per cent ($2\frac{1}{2}\%$) of the cost of said warehouse and cold storage building for superintending the construction thereof," but that no services by him have been performed as the superintendent thereof, although appellant "is ready, willing and able to perform such services as superintendent; * * * that said plans and specifications were fully completed by him and were accepted and approved by the said defendants, and that your orator is ready, willing and able to deliver said plans and specifications unto said defendant"; "that the said C. J. Sammis knowingly permitted the said Lawrence B. Portman and Raymond H. Portman to contract with your orator for the performance of such services as an architect in the preparation of said plans and specifications for the improvement of or the proposed improvement of said premises, and for the building of or the proposed building of the said warehouse and cold storage building." Said bill

necessary work and services as an architect for the said warehouse and cold storage building * * *, and that the said prices were to be conveyed to the General Warehouse and Cold Storage Company, a company to be incorporated of the city of Regina, Illinois, by the said C. L. Smith, William L. Hickert and others, and that your orator agreed to perform said services, furnishing plans and specifications therefor, for two and one-half per cent (2½%) of the cost of said warehouse and cold storage building, the cost of which was to be obtained through bids received by your orator, and which said bids were received, totaling $241,900 for the construction of said warehouse and cold storage building in accordance with said plans and specifications as prepared by your orator for said defendants, and that the said payment of two and one-half per cent (2½%) of the cost of said warehouse and cold storage building was to be paid to your orator by the [illegible] by your orator, and that said bids were received by your orator on September 30th, 1920."

Said bill further avers "that the said defendants agreed to pay an additional two and one-half per cent (2½%) of the cost of said warehouse and cold storage building for supervising the construction thereof," but that no services by him have been performed in the supervision thereof, although appellant "is ready, willing and able to perform such services as supervisement; * * * that said plans and specifications were fully completed by Ries and were accepted and approved by the said defendants, and that your orator is ready, willing and able to deliver said plans and specifications unto said defendants"; "that the [illegible] Portman and Raymond H. Portman to contract with your orator for the performance of such services as an architect in the preparation of said plans and specifications for the improvement of or the proposed improvement of said premises, and for the building of or the proposed building of the said warehouse and cold storage building." Said bill

further alleged that appellant had filed a lien against said premises for the amount claimed by him.

An answer was filed by Wickert, but it is not necessary to consider the same, as appellant thereafter dismissed said bill as to him.

Appellee answered said bill, admitting the ownership of said lots, but denying that he ever authorized the Portmans to employ appellant as an architect on his behalf; averring that he had no knowledge or information that appellant was making any claim that he had been so employed, and denying that he ever accepted or approved said plans and specifications, and specifically denying each and every averment of said bill tending to show that he had anything whatever to do with the contracting for said plans and specifications, etc.

Said cause was referred to the master to take the evidence and report the same, together with his conclusions of law and fact thereon. The evidence was taken and reported by said master, together with his findings and conclusions. Objections were filed to said report by appellant which were overruled by the master, and being ordered to us exceptions were overruled by the court and a decree was entered, dismissing said bill for want of equity. To reverse said decree, this appeal is prosecuted.

The evidence discloses that in March or April, 1925, Raymond H. Portman came to appellee to ascertain if he would sell his property above mentioned, stating that L. B. Portman and Co. were looking for property on which to build a warehouse; that appellee told him he would sell said premises for $18,000; that on or about April 15, 1925, said Raymond Portman called on appellant, who is a licensed architect, and employed him to prepare plans and specifications for the erection of a warehouse and cold storage building on said premises.

Appellant testified that he asked Portman "how large a building they proposed to build. He replied 'they wanted to make a

further alleged that appellant had filed a lien against said premises for the amount claimed by him.

An answer was filed by Mickert, but it is not necessary to consider the same, as appellant thereafter dismissed said bill as to him.

Appellee answered said bill, admitting the ownership of said lots, but denying that he ever authorized the Fortmann to employ appellant as an architect on his behalf; averring that he had no knowledge or information that appellant was making any claim that he had been so employed, and denying that he ever accepted or approved said plans and specifications, and specifically denying each and every avermment of said bill tending to show that he had anything whatever to do with the contracting for said plans and specifications, etc.

Said cause was referred to the master to take the evidence and report the same, together with his conclusions of law and fact thereon. The evidence was taken and reported by said master, together with his findings and conclusions. Objections were filed to said report by appellant which were overruled by the master, and being ordered to as exceptions were overruled by the court and a decree was entered, dismissing said bill for want of equity. To reverse said decree, this appeal is prosecuted.

The evidence discloses that in March or April, 1928, Raymond [illegible] above mentioned, stating that L. E. Fortmann and Co. were looking for property on which to build a warehouse; that appellee told him he would sell said premises for $18,000; that on or about April 18, 1928, said Fortmann called on appellant, who is a licensed architect, and employed him to prepare plans and specifications for the erection of a warehouse and cold storage building on said premises.

Appellant testifies that he asked Fortmann "how large a building they proposed to build. He replied 'they' wanted to make a

building as large as they could with the amount of money they had available, which was about $500,000, including the lot and equipment'"; that Portman informed him that they were contemplating organizing a corporation to construct said warehouse, to be known as The Central Illinois Warehouse and Cold Storage Company. Appellant further testified that he completed the plans and specifications, advertised for bids thereon, etc.; that on September 30, 1925 he received bids for certain of the work to be constructed, and that on other of the items he did not receive bids; that as to the items for which he did not receive bids, he estimated the cost would be in the aggregate $49,000. This amount, together with the items on which he received bids, made a total of $541,900, and it is on this amount he claims compensation of 2½% for his services as an architect.

Without going into a detailed discussion of the same, the evidence wholly fails to support the allegation of appellant's bill to the effect that a contract had been entered into by appellee with him, either directly or through the Portmans, for the drawing of said plans and specifications. There is no evidence in the record even tending to prove said allegations. Appellant himself testified: "I drew the plans and specifications for the Central Warehouse and Cold Storage Company * * *. I do not claim that there was any contract between me and Sammis, wherein he agreed to pay me 2½% for this work."

Counsel for appellant practically abandon that feature of their case, but insist that the evidence in the record establishes that appellee was cognizant of the fact that the Portmans had employed appellant to prepare said plans and specifications, and that he actively acquiesced therein and advised with appellant from time to time in regard to their preparation, etc. The evidence however, is to the effect that appellant never saw or talked with appellee in regard to anything he was doing with reference to said plans and specifications until the latter part of June or first of July, some two months or more after

building as large as they could with the amount of money they had available, which was about $300,000, including the lot and equipment"; that Foreman informed him that they were contemplating organizing a corporation to construct said warehouse, to be known as the Central Illinois Warehouse and Cold Storage Company. Appellant further testified that he completed the plans and specifications, advertised for bids thereon, etc.; that on September 30, 1916 he received bids for certain of the work to be constructed, and that on other of the items he did not receive bids; that as to the items for which he did not receive bids, he estimated the cost would be in the aggregate $40,000. This amount, together with the items on which he received bids, made a total of $241,000, and it is on this amount he claims compensation of 2½% for his services as an architect.

Without going into a detailed discussion of the same, the evidence wholly fails to support the allegation of appellant's bill to the effect that a contract had been entered into by appellee with him, either directly or through the Foreman, for the drawing of said plans and specifications. There is no evidence in the record even tending to prove said allegations. Appellant himself testifies: "I drew the plans and specifications for the Central Warehouse and Cold Storage Company * * *. I do not claim that there was any contract between me and Sandis, wherein he agreed to pay me 2½% for this work."

Counsel for appellant practically admit that footing of their case, but insist that the evidence in the record establishes that appellee was cognizant of the fact that the Foreman had employed appellant to prepare said plans and specifications, and that he actively acquiesced therein and advised with appellant from time to time in regard to their preparation, etc. The evidence, however, is to the effect that appellant never saw or talked with appellee in regard to anything he was doing with reference to said plans and specifications until the latter part of June or first of July, some two months or more after

his employment by the Portmans. Appellant further testified that at that time he did not inform appellee of his employment or what he was to be paid, etc.; that at the time he first talked with appellee approximately half of the work in the preparation of said plans and specifications had been completed. At no time in his testimony does he state that appellee ever agreed to pay him for his work, or that he ever stated that he had authorized the Portmans to employ appellant.

The testimon of appellant and his witnesses goes no farther than to show that appellee was taking some interest in the preparation of said plans and specifications, and made inquiry with reference to the progress thereof. Appellee in his testimony denied ever having employed appellant or ever having authorized the Portmans to employ him, and stated that his interest in the preparation of said plans and specifications only had to do with the effect it might have on the sale of his lots. The evidence also, both on the part of appellant and of appellee, clearly discloses that appellant was fully advised with reference to the fact that the Portmans were seeking to organize a corporation to take over appellee's property and to construct thereon the warehouse and cold storage plant for which appellant was preparing the plans and specifications. The evidence further shows that the Portmans were unable to finance said project, and that the same was abandoned. The purchase of appellee's lots was not consummated, and the building was not constructed.

The questions arising on this record on the errors assigned by appellant are:

1. As to whether an architect can recover under a mechanic's lien, his fees as such for the preparation of the plans and specifications for a building to be erected on a certain lot or lots, where the plans are not used and the building is not constructed.

2. As to whether on the record in this case a lien would lie

employment by the Portmans. Appellant further testifies that at that time he did inform appellee of his employment or what he was to be paid, etc.; that at the time he finished talking with appellee approximately half of the work in the preparation of said plans and specifications had been completed. At no time in his testimony does he state that appellee ever agreed to pay him for his work, or that he ever stated that he had authorized the Portmans to employ appellant.

The testimony of appellant and his witnesses goes no farther than to show that appellee was taking some interest in the preparation of said plans and specifications, and made inquiry with reference to the progress thereof. Appellee in his testimony denied ever having employed appellant or ever having authorized the Portmans to employ him, and stated that his interest in the preparation of said plans and specifications only had to do with the effect it might have on the sale of his lots. The evidence also, both on the part of appellant and of appellee, clearly [illegible] the fact that the Portmans were seeking to organize a corporation to take over appellee's property and to construct thereon the warehouse and cold storage plant for which appellant was preparing the plans and specifications. The evidence further shows that the Portmans were unable to finance said project, and that the same was abandoned. The purchase of appellee's lots was not consummated, and the building was not constructed.

The questions arising on this record on the amount claimed by appellant are:

1. As to whether an architect can recover under a mechanic's lien, his fees as such for the preparation of his plans and specifications for a building to be erected on a certain lot or lots, where the plans are not used and the building is not constructed.

2. As to whether on the record in this case a lien on the lots

against appellee's property for the preparation of said plans and specifications?

Without going into a discussion of the first proposition, we are inclined to the opinion that, under the holding of the supreme court in Freeman v. Rinaker, 188 Ill. 172, and in Stand. Oil Co. v. Vanderboom, 326 Ill. 418, a mechanic's lien may be maintained.

As to said second proposition, no authority has been cited by counsel for appellant which goes to the extent of holding that a mechanic's lien can be enforced for the fees of an architect, where the owner of the property has had nothing to do with the employment of such architect, directly or indirectly but where knowledge of such employment comes to said owner after a part of the work has been performed and he makes no objection thereto.

The mechanic's lien law is in derogation of the common law. Its provisions are to be strictly construed, and no one can claim a lien unless it clearly appears that the requirements of the law have been complied with. May Brick Co. v. General Engineering Co., 180 Ill. 535; Freeman v. Rinaker, supra, 172; Cronin v. Tatge, 281 Ill. 336.

Where a lot owner may have had nothing, directly or indirectly to do with the improvement of his lot, but stands by and knowingly permits such improvements to be made a lien is awarded on the principle that it would be inequitable for the owner to knowingly receive the benefits of such improvement and have his lot exempted from liability therefor. Bastrup v. Frendergast, 179 Ill. 553-560; Loughran v. Gorman, 256 Ill. 46-49. There is no other logical theory upon which said statute could be construed to give a lien under such circumstances, there being no contractual relation between the owner and the claimant.

In this case, however, appellant knew that said plans

[illegible]

Without going into a discussion of the first proposition, we are inclined to the opinion that, under the holding of the supreme court in Pearson v. Hinckley, 155 Ill. 172, and in Stand. Oil Co. v. [illegible]rbom, 325 Ill. 416, a mechanic's lien may be maintained.

As to such second proposition, no authority has been cited by counsel for appellant which goes to the extent of holding that a mechanic's lien can be enforced for the repair of an aeroplane, where the [illegible] of the property has had nothing to do with the employment of mechanics, directly or indirectly but where knowledge of such employment comes to said owner after a part of the work has been performed and he makes no objection thereto.

The mechanic's lien law is in derogation of the common law. Its provisions are to be strictly construed, and no one can claim a lien unless it clearly appears that the requirements of the law have been complied with. Ill. Union Co. v. [illegible] Co., 147 Ill. 121; Pearson v. [illegible], 155 Ill. [illegible].

Where a lot owner may have had nothing, directly or indirectly to do with the improvement of his lot, but stands by and knowingly permits such improvements to be made a lien is founded on the principle that it would be inequitable for the owner to knowingly receive the benefits of such improvements and have his lot exempted from liability therefor. Bauman v. Hermansen, 174 Ill. 333-340; Longman v. Gorman, 325 Ill. 46-49. There is no other logical theory upon which such statute could be construed to give a lien under such circumstances, there being no contractual relation between the owner and the claimant.

In this case, however, appellant may have said plane

and specifications were not for the purpose of erecting a building on said property, as the property of appellee, but for a building to be constructed on said property after it had been conveyed by appellee to the Portmans or to the proposed corporation. As stated, appellant's testimony is to the effect that Portman advised him that they had $500,000 available, which was to cover the cost of the real estate, the erection and equipment of the building thereon.

Testimony was offered on the part of appellant tending to show that about a month after said bids were received, he learned that appellee was to have been the president of the corporation which the Portmans were seeking to organize. The evidence, however, fails to show any activity in that direction on the part of appellee; even if it did, it has nothing to do with this case, for the reason that the corporation was not formed, and the employment of appellant was by the Portmans. Appellant's own testimony shows that appellee had nothing whatever to do with such employment and did not know of it until more than two months thereafter, and considerable of the work had been done.

Aside from the question as to whether, appellee could maintain a statutory lien against appellee's property, if his evidence were sufficient, the clear preponderance of the evidence supports appellee's theory that the Portmans did not in any way purport to bring appellee into the matter of the employment of appellant to prepare said plans and specifications. The record discloses that the Portmans were confined in the penitentiary at Leavenworth, Kansas, at the time of said hearing. On the application of appellee to have their testimony procured, appellant admitted that they would testify, among other things, that appellee had nothing whatever to do with the employment of appellant; "that the said Samais had no notice or knowledge of any kind or character of such employment by the said L. B. Portman and Company

[illegible] appellee to the Portmans or to the proposed corporation. As stated, [illegible]

Testimony was offered on the part of appellant tending to show that about a month after said bids were received, he learned that appellee was to have been the president of the corporation which the Portmans were seeking to organize. The evidence, however, fails to show any activity in this direction on the part of appellee; even if it did, it has nothing to do with this case, for the reason that the corporation was not formed, and the employment of appellant was by the Portmans. Appellant's own testimony shows that appellee had nothing whatever to do with such employment and did not know of it until more than two months thereafter, and considerable of the work had been done.

Aside from the question as to whether, appellee could maintain a statutory lien against appellee's property, if his evidence were sufficient, the clear preponderance of the evidence supports appellee's theory that the Portmans did not in any way purport to bring appellee into the matter of the employment of appellant to prepare said plans [illegible] fined in the penitentiary at Leavenworth, Kansas, at the time of said [illegible] cured, appellant admitted that they would testify, among other things, that appellee had nothing whatever to do with the employment of appellant; "that the said Bowlin had no notice or knowledge of any kind or character of such employment by the said L. E. Portman and Company

of the said Hulsebus, or the proposed employment of the said Hulsebus or any other architect for the purpose of drawing plans and specifications for the proposed warehouse, until the latter part of June, 1925; * * * that the only connection which the said C. J. Sammis had with the proposed building of the proposed warehouse was that the said Sammis agreed that if L. B. Portman & Company should organize a corporation for the purpose of constructing a warehouse in the City of Peoria, Illinois, that the said Sammis would sell his said lot to such proposed corporation for the sum of Eighteen Thousand Dollars ($18,000.00) cash." Appellant did not admit the truth of this proposed testimony, but admitted that the Portmans would so testify, if present.

For the reasons above set forth, we hold that the court was fully warranted in entering a decree dismissing appellant's bill for want of equity, and the decree will therefore be affirmed.

Decree affirmed.

of the said Kingston, or the property [illegible] or any other architect for the purpose of drawing plans and specifications for the proposed warehouse, until the latter part of June, 1920; [illegible] the said [illegible] for the proposed building of the proposed warehouse was that the said Kingston agreed that if R. G. Workman & Company should organize a corporation for the purpose of constructing a warehouse in the City of Peoria, Illinois, that the said Samuels would sell his lot to such proposed corporation for the sum of Eighteen Thousand Dollars ($18,000.00) cash." Appellant did not admit the truth of this proposed testimony, but admitted that the Workmans would so testify, if present.

For the reasons above set forth, we hold that the court was fully warranted in entering a decree dismissing appellant's bill for want of equity, and the decree will therefore be affirmed.

Decree affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

_____
Clerk of the Appellate Court

(53761—3M—7-27)

abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the ~~fourth~~ seventh day of ~~October~~ February, in the year of our Lord one thousand nine hundred and twenty-~~seven~~ eight, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 7783 Agenda 52

APRIL TERM 1927

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. G. G. LUTHY, Appellee,	:	APPEAL FROM THE
vs	:	CIRCUIT COURT OF PEORIA COUNTY.
EMIL C. WETTEN, Appellant.	:	

Jett, P. J.

This is an appeal by Emil C. Wetten, appellant, from a judgment of ouster rendered against him as President of the National Duroc Record Association. Appellee filed a demurrer to appellant's plea of justification which was sustained and appellant elected to stand by his plea. The question is whether or not the lower court erred in sustaining appellee's demurrer thereby holding that the plea did not show good title to the office of President in appellant.

The petition of appellee for leave to file the information shows that the National Duroc Record Association is a corporation organized on December 22, 1923, "not for profit", under the law of Illinois.

(2) That at the first meeting of the members of the Association held on December 19th, 1923, a set of by-laws designated as Constitution and By-laws of National Duroc Record Association were adopted which are set out in full in the petition. (It is not necessary to set out herein all of the Constitution and By-laws.)

Gen. No. 7703 Agenda 32

APRIL TERM 1927

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. C. U. DUFFY,	:
Appellee,	:
vs.	:
EMIL C. WETTER,	:
Appellant.	:

APPEAL from the CIRCUIT COURT of COOK COUNTY.

Lett, P. J.

This is an appeal by Emil C. Wetter, respondent, from a judgment of ouster rendered against him as President of the National Dance Record Association. Appellee filed a demurrer to appellant's plea of justification which was sustained and appellant elected to stand by his plea. The question is whether or not the lower court erred in sustaining appellee's demurrer thereby holding that the plea did not show good title to the office of President in appellant.

The petition of appellee for leave to file the information shows that the National Dance Record Association is a corporation organized on December 22, 1923, "not for profit", under the law of Illinois.

(2) That at the first meeting of the members of the association held on December 17th, 1923, a set of so-called designated as Constitution and By-Laws of National Dance Record Association were adopted which are set out in full in the petition. (It is not necessary to set out herein all of the Constitution and By-Laws.)

Article II of said constitution as originally adopted reads as follows:

> "The annual meeting of this corporation shall be held at the office of the Association at Peoria, Illinois, at a time fixed by the Board of Directors. Notice of such meeting to be mailed by the Secretary to the last post-office address (as same appears on the membership record of the association) of each member at least 15 days prior to the date of such meeting. At such annual meeting the members shall elect a President, and a Vice-President, who shall hold their office for a term of one year and until their successors are elected and qualified. The secretary and treasurer shall be elected for a term of three years. At the annual meeting in December, 1937, the members shall elect a secretary, and a treasurer, such secretary and treasurer to be elected for a term of three years beginning January 1st, following their election, and continue until their successors are elected and qualified. Only members of the Board of Directors are eligible for the offices of President, Vice-president and Treasurer.

That the Board of Directors approved on December 19th, 1935, said Constitution and By-laws and managed the business and affairs of the Association in accordance with the terms thereof and that said Constitution and By-laws continued to be and were the by-laws of said Association until their revision and amendment by the members and the directors as hereinafter set forth.

(2) That at the regular annual meeting of the members of said National Paper & Cord Association held on the 4th day of December, 1943, at the office of the said Association pursuant to a written notice, the members amended Article II of the Constitution. Article II as amended is as follows:

> The annual meeting of this corporation shall be held at the office of the Association at Peoria, Illinois, at a time fixed by the Board of Directors. Notice of such meeting to be mailed by the Secretary of the last post-office address (as same appears on the membership record of the Association) of each member at least 15 days prior to the date of such meeting. The annual meeting of the Board of Directors of this corporation shall be held immediately after

the adjournment of the annual meeting of the members of this corporation. The said Board of Directors at such meeting shall elect a President and a Vice-President who shall hold their offices for a term of one year and until their successors are elected and qualified. The Secretary and Treasurer shall be elected for a term of three years. At the annual meeting of the Board of Directors in December, 1926, the Board of Directors shall elect a Secretary and a Treasurer, such Secretary and Treasurer to be elected for a term of three years beginning January 1st, following their election, and continue until their successors are elected and qualified. Only members of the Board of Directors are eligible for the offices of President, Vice-President and Treasurer."

(4) That at the regular annual meeting of the Board of Directors also held on said December 4th, 1925, Section 12 of the By-laws was amended, and as amended reads:

"These By-laws may be altered or amended at anytime, at a regular meeting of the Board of Directors, or at a special meeting called for that purpose by an affirmative vote of two-thirds of the Directors.

Amendments to the Constitution may be made at any regular meeting of the Association provided sixty days notice of the substance of such proposed amendments has been given to the Secretary and specified by him in the call for such meeting; and the Secretary shall submit such proposed amendments to the attorney of the association, fifty days prior to the meeting, for his opinion as to their legality.

A committee on Constitution consisting of three members may be appointed by the President and all amendments proposed to the Constitution shall be referred to this Committee which shall consider the same and make a report thereon to the annual meeting of the Association."

(5) That no further amendments to the Constitution and By-laws were made or attempted to be made until the annual meeting of the members on December 4th, 1926.

(6) That at said annual meeting on December 4th, 1926, a majority of the members, over objection of more than one-third of the members, voted and amended Article IX of the Constitution to read as it was originally, that is so that the president and other

the adjournment of the annual meeting of the members of this corporation. The said Board of Directors shall elect a President, a Vice-President and a Treasurer who shall hold their offices for a term of one year and until their successors are elected and qualified. The Secretary and Treasurer shall be elected for a term of three years. At the annual meeting of the Board of Directors in December, 1920, the Board of Directors shall elect a Secretary and a Treasurer, such Secretary and Treasurer to be elected for a term of three years beginning January 1st, [illegible] successors are elected and qualified. Only members of the Board of Directors are eligible for the offices of President, Vice-President and Treasurer."

(4) That at the regular annual meeting of the Board of Directors also held on said December 4th, 1920, Section 1b of the By-laws was amended, and as amended reads:

> "These By-laws may be altered or amended at anytime, at a regular meeting of the Board of Directors, or at a special meeting called for that purpose by an affirmative vote of two-thirds of the directors.
>
> Amendments to the Constitution may be made at any regular meeting of the Association provided sixty days notice of the substance of such proposed amendments has been given by the Secretary and specified by him in the call for such meeting; and the Secretary shall submit such proposed amendments to the attorney of the Association, with [illegible] for his opinion as to their legality.
>
> A committee on Constitution consisting of three members may be appointed by the President and all amendments proposed to the Constitution shall be referred to this Committee which shall consider the same and make a report thereon to the annual meeting of the Association."

(5) That no further amendments to the Constitution and By-laws were made or attempted to be made until the annual meeting of the members on December 4th, 1920.

(6) That at said annual meeting on December 4th, 1920, a majority of the members, over objection of more than one-third of the members, voted and amended Article IX of the Constitution to read as it was originally, that is, that the President and other

officers should be elected by the members instead of by the Board of Directors which was provided by Article III as the directors [illegible] it on December 4th, 1[illegible];

That no notice was given to the members prior to the meeting that an attempt would be made to amend the Constitution and by-laws;

That no notice was given 15 days prior to the meeting as required by Article XVIII of the Constitution. Article XVIII of the Constitution provides:

> "This Constitution may be altered or amended in any regular meeting by two-thirds vote of the members voting, provided that notice of such proposed change be given in the notice mailed by the secretary more than 15 days prior to the meeting except Article V which shall require a vote of two-thirds of the membership of this association.

That no notice was given to the Secretary 30 days prior to the meeting;

That none of the amendments were submitted to the Secretary in his call of the annual meeting nor were they submitted to the attorney of the association 30 days prior to the meeting for his opinion as to their legality, as provided by section XIII of the By-laws.

(7) That on December 4th, 1[illegible], when the Constitution and by-laws were amended, [illegible] portion of the members, over the objection of one-third of the members, voted and elected Will [illegible] Vetter president, and [illegible] other officers; that immediately after the adjournment of the annual meeting Will [illegible] Vetter announced himself to be president of the association for the ensuing year and immediately began to hold and exercise the powers of president of said association.

(8) That Emil C. Wetten was never elected president by the Board of Directors, as provided by Article IX as amended; that Article IX as amended in 1925 was not legally modified in 1926; and that the by-laws are now the same as adopted and amended in 1925.

(10) The prayer of the petition follows for leave to file an information requiring Emil C. Wetten to show by what authority he holds and assumes the office of president of the National Duroc Record Association. The information is as follows:

> "now comes, Henry E. Platt, State's Attorney for the said County of Peoria, who sues for the People of the State of Illinois in this behalf, on this day before this Honorable Court for said People, and in the name and by the authority thereof, at the relation of G. G. Luthy for the purpose of giving the Court to understand and to be informed that Emil C. Wetten, since the fourth day of December, A. D. 1926, for the space of fifteen days now last past and more, unlawfully has held and executed and still does hold and execute, without any warrant, right or lawful authority whatsoever, the office of President of National Duroc Record Association, a corporation, not for Pecuniary Profit, organized and existing under and by virtue of the laws of the State of Illinois, the principal office of said corporation being located in the City of Peoria, in the County of Peoria aforesaid; which said office the said Emil C. Wetten, during all the time aforesaid, in the county aforesaid, upon the said People has usurped and still does continue to hold and execute the rights and privileges of President of the Corporation aforesaid, to the damage and prejudice of the said People, and against the peace and dignity of the same."

The principal facts relied upon by the appellant in his plea are that the National Duroc Record Association is a corporation "not for pecuniary profit", organized under the laws of the State of Illinois; that among its objects are,

> "the establishment, maintenance and publication of a pedigree record of Duroc-Jersey Swine," and the performance of such other acts incidental and supplementary thereto, as will in the judgment of such Association best promote the breeding and improvement of said breed of swine."

(8) That Emil G. Webber was never elected president by the Board of Directors, as provided by Article IX as amended; that Article IX as amended in 1928 was not legally modified in 1929; and that the by-laws are now the same as adopted and amended in 1928.

(10) The prayer of the petition follows for leave to file an information against Emil G. Webber [illegible] be held and answer the action of quo warranto [illegible] Record Association. The information is as follows:

> "Now comes, George E. Kelly, Attorney for the said County of Peoria, who sues for the People of the State of Illinois in their behalf, on this day before this Honorable Court for said People, and in the name and by the authority thereof, at the relation of G. G. Dubby for his proper of giving the Court to understand and be informed that Emil G. Webber, since the fourth day of December, A. D. 1928, for the space of fifteen days now last past and more, unlawfully has held and exercised and still does hold and exercise, without any warrant, right or lawful authority whatsoever, the office of President of the Peoria Pedigree Record Association, a corporation not for Pecuniary Profit, organized and existing under and by virtue of the laws of the State of Illinois, the principal office of said corporation being located in the City of Peoria, in the County of Peoria aforesaid; which said office the said Emil G. Webber, during all the time aforesaid, in said county aforesaid, upon the said People has usurped and still does usurp time to hold and exercise the rights and privileges of President of the Corporation aforesaid, to the damage and prejudice of the said People, and against the peace and dignity of the same."

The principal facts relied upon by the appellant in his plea are that the National Duroc Record Association is a corporation "not for pecuniary profit", organized under the laws of the State of Illinois; that among its objects are,

> "the establishment, maintenance and promotion of a pedigree record of Duroc-Jersey Swine," and the performance of such other acts incidental and supplementary thereto, as will in the judgment of such Association best promote the breeding and improvement of said breed of swine."

that it has nearly seven thousand members resident throughout the United States; that said corporation was organized December 19th, 1923; that at such meeting a set of by-laws divided into two sections designated by those forming the corporation as a "Constitution and By-laws" was unanimously ratified and approved; said Constitution and By-laws were adopted by the members on said day; that on December 19th, 1923, W. H. Van Meter, J. R. Pfander and G. G. Luthy acting in accordance with the instructions given them at such original meeting of the members, prepared and filed with the Secretary of the State of Illinois an application for a charter for said National Duroc Record Association and the same was issued thereon December 22nd, 1923, and that said "Constitution and By-laws" became and were the valid by-laws of said corporation.

The plea then sets out, among other things, Article IX of said By-laws designated as the Constitution.

The plea further alleges that prior to the regular annual meeting of the members of said National Duroc Record Association, which was held on December 4, 1925, a written notice of the annual meeting was sent to the members of the Association (which notice is sent out verbatim) which gave notice that an amendment to Article IX of the Constitution would be voted upon, which amendment provided that the officers of the Association should be elected by the directors instead of by the members.

That a proxy was enclosed with the notice of the annual meeting, which proxy gave an opportunity to the members to express their views for or against the proposed change in Article IX, (the proxy being set out verbatim);

That 1093 proxies were received from various members

the United States; that said corporation was organized December 19th, 1922; that at such meeting a set of by-laws divided into two sections designated by those terming the corporation as a "Constitution and By-laws" was unanimously modified and approved; said Constitution and By-laws were adopted by the members on said day; that on December 19th, 1922, W. H. Van Horn, J. A. Blanken and G. G. Lusby acting in accordance with the instructions given them at such original meeting of the members, prepared and filed with the Secretary of the State of Illinois an application for a charter for said National Dance Record Association and the same was issued thereon December 22nd, 1922, and upon said Constitution and By-laws' terms and was with the - [illegible] arrangements.

Despite [illegible], [illegible] IX of said By-laws designated as the Constitution.

The plaintiff further alleges that prior to the regular annual meeting of the members of said National Dance Record Association, which was held on December 4, 1928, a written notice of the annual meeting was sent to the members of the Association (which notice is [illegible]) [illegible] amendment to Article IX of the Constitution would be voted upon, which amendment provided that the officers of the Association should be elected by the directors instead of by the members.

That a proxy was enclosed with the notice of the annual meeting, which proxy gave an opportunity to the members to express their views for or against the proposed change in Article IX, (the proxy being set out verbatim);

That 1088 proxies were received from various members

appointing N. J. Porter their proxy;

That 496 of such members, being more than one-third, directed their proxy to vote against the amendment of Article lX;

That at the annual meeting held in accordance with the aforesaid notice, the minutes of the meeting (set out verbatim) disclosed that N. J. Porter, to whom all proxies were addressed, cast all proxies voted for the amendment and that of the sixteen members present at said meeting all sixteen likewise voted for the amendment.

Said plea further states that at the regular annual meeting of the Board of Directors of the National Duroc Record Association held on December 4th, 1925, section Xll of the By-laws of the association was amended.

It is then charged that no further amendments to the constitution and by-laws of the association were made either by the members or directors from December 4th, 1925, until December 4th, 1926; that at the regular meeting of the members held on December 4th, 1926, Mr. Symonds a member made the following statement and motion: "At the last annual meeting I voted to amend Article lX of our constitution, at this meeting I would like to have the vote reconsidered and so move." Mr. Luthy raised a point of order that no amendments could be offered at this time; the chair sustained the point of order; the chairman overruled the motion whereupon the appellant appealed from the decision of the chair which appeal was seconded by several members and it having been put to a vote by the members the members voted to overrule the decision of the chairman. The previous question having been called for the chairman put the question. A large number of

Appendix I. [illegible]

[illegible]

That at the annual meeting held in accordance with the [illegible] notice, the minutes of the meeting (not not verbatim) disclosed that Mr. G. [illegible], to [illegible] then all proxies [illegible], that all proxies voted for the amendment and that of the minutes members present at said meeting all minutes likewise voted for the amendment.

Said plan further shows that at the regular annual meeting of the Board of Directors of the National Home Loan Association held on December 14th, 1938, section VII of the by-laws of the association was amended.

It is then charged that no further amendments to the constitution and by-laws of the association were made within the members or directors since December 14th, 1938, until December 14th, 1939; that at the regular meeting of the members held on December 14th, 1939, Mr. [illegible] a member made the following statement and motion: "At the last annual meeting I voted to amend Article IX of our constitution, at that meeting I would like to have the vote reconsidered and so move." Mr. [illegible] raised a point of order that no amendments could be considered at this time; the chair sustained the point of order; the chairman overruled the motion; then upon the appellant appealed from the decision of the [illegible] which appeal was seconded by several members and it having been put to a vote by the members the members voted to overrule the decision of the chairman. The previous question having been called for the chairman put the question. A large number of

members voted aye and Mr. Terpening voted his 2534 proxies in favor of the motion. Mr. Luthy thereupon stated that he refused to vote his 1942 proxies and the chairman ruled that the motion had been carried and the question of re-adoption or rejection to the proposed amendment was before the meeting for action. Thereupon the defendant moved that Article IX of the constitution which provides for the election of the secretary and treasurer at the annual meetings of the members as originally adopted in the constitution and by-laws be re-adopted. Luthy objected to such procedure. He was sustained by the chair and the chair was overruled and said motion carried by the same vote of those present in person and by proxy as heretofore set forth with Luthy refusing to vote; that after said motion was so carried the following resolution was adopted; Resolved that Article IX of the constitution be amended by striking out the words "three years" and substituting the word "one year"; Mr. Luthy made the same objection and the resolution was adopted by the same vote as above set forth and refused to vote his 1942 proxies.

The plea then proceeds and charges that J. R. Pfander was nominated for secretary for the ensuing year over the objection of Mr. Luthy and that Mr. Terpening was nominated over the objection of Mr. Luthy for the office of treasurer for the ensuing year; That Emil C. Wetten was nominated over the objection of Mr. Luthy for president of the association for the ensuing year; that William Anderson was nominated over the objection of Mr. Luthy for the office of vice-president of said association for the ensuing year and that the appellant moved for the reconsideration of the vote adopting Article IX providing for the election of the secretary and

members voted aye and Mr. Torpening voted his 3564 proxies in favor of the motion. Mr. Lusby thereupon stated that he refused to vote his 1942 proxies and the chairman ruled that the motion had been carried and the question of re-adoption or rejection to the proposed amendment was before the meeting for action. Thereupon the defendant moved that Article IX of the constitution which provides for the election of the secretary and treasurer at the annual meetings of the members as originally adopted in the constitution and by-laws be re-adopted. Lusby objected to such procedure. He was sustained by the chair and the chair was overruled and said motion carried by the same vote of those present in person and by proxy as heretofore set forth with Lusby refusing to vote; that after said motion was so carried the following resolution was adopted; Resolved that Article IX of the constitution be amended by striking out the words "three years" and substituting the word "one year"; Mr. Lusby made the same objection and the resolution was adopted by the same vote as above set forth and refused to vote his 1942 proxies.

The chair then announced, inter alia, that nominations were nominated for secretary for the ensuing year over the objection of Mr. Lusby and that Mr. Torpening was nominated over the objection of Mr. Lusby for the office of treasurer for the ensuing year; That Emil G. Vetter was nominated over the objection of Mr. Lusby for president of the association for the ensuing year; that William Anderson was nominated over the objection of Mr. Lusby for the office of vice-president of said association for the ensuing year and that the appellant moved for the reconsideration of the vote adopting Article IX providing for the election of the secretary and

treasurer by the members stating that "I voted in favor of the adoption of Article IX;" that a large number of members voted "no" and that there were no votes for reconsideration and that the meeting was then adjourned; that the appellant was on the 4th day of December a member of the National Duroc Record Association in good standing; a director thereof, and engaged in the breeding of Duroc-Jersey Swine, showing his necessary legal qualifications to hold the office under Articles III and IX of the constitution and by-laws provided he were duly elected.

A decision in this cause involves the legality of the proceedings by which it is claimed Article IX was amended at the meeting held on December 4th, 1926. Before discussing the proceedings by which it is claimed the constitution was amended at the December meeting 1926, we desire to briefly allude to the contention of appellant relative to the amendment of Article IX at the December meeting, 1925. The only suggestion made by appellant relative to the amendment of Article IX at the December meeting in 1925 is that M. J. Porter voted 496 of the 1093 proxies given him in favor of the amendment to Article IX in violation of the instructions contained in said 496 proxies to vote against such proposed amendment and that because of that fact the amendment failed to receive a two-thirds vote of the members voting as required by Article XVIII. We have examined the contention of appellant in this respect and are of the opinion, in view of the state of the record, that there was no legal obligation on Porter to vote the 496 proxies if he did not see fit to do so, and to concede that all of the proxies that were voted were voted in favor of the amendment. Furthermore, appellant does not seriously contend that Article IX

treasurer by the members stating that "I voted in favor of the adoption of Article IX;" that a large number of members voted "no" and that there were no votes for reconsideration and that the meeting was then adjourned; that the appellant was on the 4th day of December [illegible] in good standing; a director thereof, and engaged in the practice of [illegible] to hold the office under Articles VIII and IX of the constitution and by-laws provided he were duly elected.

A decision in this cause involves the legality of the proceedings by which it is claimed Article IX was enacted at the meeting held on December 4th, 1928. Before discussing the proceedings by which it is claimed the constitution was amended at the December meeting 1928, we desire to briefly allude to the contention of appellant relative to the amendment of Article IX at the December meeting, 1928. The only suggestion made by appellant relative to the amendment of Article IX at the December meeting in 1928 is that M. L. Porter voted 496 of the 1028 proxies given him in favor of the amendment to Article IX is violation of the instructions contained in said 496 proxies to vote against such proposed amendment [illegible] failed to receive a two-thirds vote of the members voting as required by Article XVIII. We have examined the contention of appellant in this respect and are of the opinion, in view of the state of the record, that there was no legal obligation on Porter to vote the 496 proxies if he did not see fit to do so, and to concede that all of the proxies that were voted were voted in favor of the amendment. Furthermore, appellant does not seriously contend that Article IX

was not legally amended for he says in his argument,

> "Our object in setting forth the details of the meeting of 1925 was not so much for the purpose of contending that the amendment had been illegally adopted because contrary to the express provisions of the amendment clause to the constitution, but for the purpose of showing how the board of directors, of which relator Luthy had been a member since the organization of the association, has been disregarding the expressed wishes and interests of the members of the association * * *."

Article 1X as amended in 1925 was in full force and effect at the time of the December meeting in 1926. Article XV111 of the constitution has not been modified or amended since the organization of the corporation down to the time of the institution of this proceeding. It will be remembered that Article XV111 provides that the constitution may be altered or amended at any regular meeting by a two-thirds vote of the members voting, provided that notice of such proposed change by given in the notice mailed by the secretary more than 15 days prior to the meeting, except Article 5 which shall require a vote of two-thirds of the membership of the association.

In the plea appellant sets out the notice for the annual meeting in December 1926 together with a form of proxy which the members were asked to sign and return the same to the secretary if they would be unable to be present at the meeting. No 15 days notice of such proposed amendment was given to the members prior to the December meeting, 1926, as required by Article XV111 of the Constitution and none is alleged in the plea. If said Article XV111 was a valid provision of the constitution at and prior to the time of the annual meeting held December, 1926, then the appellant and the other officers claiming to have been elected by the members by virtue of the alleged amendment of Article 1X of the constitution

was not legally amended for he says in his argument,

> "our object in setting forth the details of the meeting of 1920 was not so much for the purpose of showing that the meeting had been illegally adopted because contrary to the express provisions of the amendment clause to the constitution, but for the purpose of showing how the board of directors, of which Lathy had been a member since the organization of the association, had been disregarding the expressed wishes and interests of the members of the association * * *."

Article IX as amended in 1920 was in full force and effect at the time of the December meeting in 1920. Article XVIII of the constitution has not been modified or repealed since the organization of the corporation down to the time of the institution of this proceeding. It will be remembered that Article XVIII provides that the constitution may be altered or amended at any regular meeting by a two-thirds vote of the members voting, provided that notice of such proposed change by given in the notice mailed by the secretary more than 15 days prior to the meeting, except Article 8 which shall require a vote of two-thirds of the membership of the association.

In the plea appellant sets out the notice for the annual meeting in December 1920 together with a form of proxy which the members were asked to sign and return the same to the secretary in they would be unable to be present at the meeting. No notice of such proposed amendment was given to the members prior to the December meeting, 1920, as required by Article XVIII of the Constitution and none is alleged in the plea. If said Article XVIII was a valid provision of the constitution at and prior to the time of the annual meeting held December, 1920, then the appellant and the other officers claiming to have been elected by the members by virtue of the alleged amendment of Article IX of the constitution

at the 1926 meeting are clearly without any title to the office they seek to hold for the reason that there was no notice of any proposed amendment to said constitution sent out by the secretary to the membership at any time prior to the date of the 1926 meeting as required by said Article XVlll.

It will be observed that Section Xll of the by-laws provides that in the event it is desirous of having a vote upon an amendment to the constitution such proposed amendment shall be submitted to the secretary 60 days prior to the date of the annual meeting and that the secretary shall, in addition to the notice to the members required by Article XVlll of the constitution, submit such proposed amendment to the attorney of the association 50 days prior to the meeting for the purpose of obtaining his opinion as to the legality of the same. The amendment adopted at the December meeting in 1926 was not submitted to the secretary and attorney for said corporation as provided by section Xll of the by-laws and the plea does not so allege.

It is the contention of appellant that Article XVlll of the constitution and Section Xll of the by-laws are in violation of Section 31, chapter 32, paragraph 161, Cahill's Revised Statutes which provide:

> "The by-laws of the corporation made by the trustees, directors or managers, may be modified, altered or amended at any such regular meeting, or at any adjourned session thereof, or at any special meeting called for that purpose."

In another part of the section of the statute it is provided that such corporation may "by their trustees, directors or managers make by-laws not inconsistent with the constitution and laws of this State or the United States, which by-laws among other things shall prescribe the duties of all officers, etc. The construction which appellant places on this statute is that not-

at the 1958 meeting was directly related and pertinent to the action they took to hold for the reason that there was no notice of any proposed amendment to this constitution sent out to the membership in the customarily at our time prior to the date of the 1958 meeting as required by this Article XVIII.

It will be observed that Section XII of the by-laws provides that in the event it is desirous of having a vote upon an amendment to the constitution that proposed amendment shall be published to the membership 30 days prior to the date of the annual meeting and that the membership shall, in addition to the notice to the members required by Article XVIII of the constitution, which such proposed amendment to the authority of the association MC also prior to the meeting for the purpose of obtaining the opinion as to the legality of the same. The membership charged at the December meeting in 1958 was not complying to the necessary and strength the said appropriation as provided by section XII of the by-laws and the plan does not so allege.

It is the contention of appellees that Article XVIII of the constitution and Section XII of the by-laws are in violation of Section 24, chapter 32, paragraph 157, Illinois Revised Statutes which provide:

> "The by-laws of the corporation made by the trustees, directors or managers, may be modified, altered or amended at any such regular meeting, or at any adjourned session thereof, or at any special meeting called for that purpose."

In another part of the section of the statute it is provided that such corporation may "by their trustees, directors or managers make by-laws not inconsistent with the constitution and laws of this state or the United States, with co-laws among other things shall preserve the duties of all officers, etc. The constitution which appellant claims on this review is that mo-

withstanding the directors, managers and trustees of the corporation are given power and authority by the statute to make by-laws for such corporations that at any legally called meeting of the members of such corporation or association its members or stockholders may by a vote of the members or stock holders present amend its by-laws and that without reference to the previous notice as provided in Article XVlll being given to the members that it was proposed to amend said by-laws. We are not disposed to adopt this construction of the statute. In our opinion the statute does not give to the members present at an annual meeting the right to amend the by-laws without there having been previous notice given to all of the members of the proposed amendment as provided by Article XVlll of the constitution but that if all of the members had been so previously notified then they would have authority, if they so desired, and by proper vote to amend the same.

In Metropolitan Accident Insurance Company vs Windover, 137 Ill. 417 it was held that a by-law providing for notice to members before any amendment to the constitution could be made was a valid by-law and that any proceedings had in violation thereof were void. On page 423 in the decision of the cause the court among other things said:-

> "The constitution provided for annual meetings of the association for the election of directors and for the transaction of such other business as might come before theassociation, at which meeting each certificate holder was expected to be present either in person or by proxy, and take part in the deliberations and have a right to vote upon all questions coming before the meeting. Also that the certificate holders should have a right to alter or amend the constitution and by-laws of the association by a majority vote of those present, 'provided that all the members of the association shall have had previous notice, by mail or otherwise, of such purpose to alter or amend, and any changes thus made shall not be subject to any alteration or change of the board of directors.' * * *."

withstanding the directors, managers and trustees of the corporations are given power and authority by the statute to make by-laws for such corporations that at any legally called meeting of the members of such corporation or association the members or stockholders may by a vote of the members or stock holders present amend its by-laws and that without reference to the previous notice as provided in Article XVIII being given to the members that it was proposed to amend said by-laws. We are not disposed to adopt this construction of the statute. [illegible] give to the members present at an annual meeting the right to amend the by-laws without there having been previous notice given to all of the members of the proposed amendment as provided by Article XVIII of the constitution but that if all of the members had been so previously notified then they would have authority, if they so desired, and by proper vote to amend the same.

In Metropolitan Accident Insurance Company vs Windover, 187 Ill. 417 it was held that a by-law providing for notice to members before any amendment to the constitution could be made was a valid by-law and that any proceedings had in violation thereof were void. On page 425 in the decision of the court among other things said:-

> "The association provides "a complete system of the association for the election of directors and for the transaction of such other business as might come before the association, at which meeting each certificate holder was expected to be present either in person or by proxy, and take part in the deliberations and have a right to vote upon all questions coming before the meeting. Also that the certificate holders should have a right to alter or amend the constitution and by-laws of the association by a majority vote of those present, 'provided that all the members of the association shall have had previous notice, by mail or otherwise, of such purpose to alter or amend, and any changes thus made shall not be subject to any alteration or change of the board of directors.' " * * *."

On page 433 of the same cause the court further said:

> "At the next annual meeting after the date of said certificate, which was held September 8, 1885, an attempt was made to change said by-laws. * * *
>
> There is evidence tending to show that notice of said annual meeting was sent to many of the members of the association, but whether such notice was sent to Windover does not appear, nor is it shown whether he was present at the meeting, either in person or by proxy. Nor is there any evidence that the notice issued contained any statement that the purpose of the meeting would be to alter or amend the by-laws. Under these circumstances the trial court was justified in holding that the attempted change in the by-laws was not binding on Windover, and that the rights of the plaintiff are subject to the by-laws as they stood at the time said certificate was issued."

In Bagley, et al vs Reno Oil Company, et al, 201 Pa. 78, 50 Atl. Rep. 760 the court discusses the necessity and propriety of a notice to the members where there is to be any change in the basic laws of the corporation regardless of whether or not there is a by-law providing for such notice. This case involved a corporation for pecuniary profit but the reasons for the rule there announced are peculiarly applicable here.

> "Upon the by-laws, as adopted and regulating the affairs of a corporation in which a stockholder has invested his money, he relies for a management as therein provided, and it is not reasonable that even at a regular or annual meeting radical changes should be made without notice to him of such contemplated action. By experience and observation we know that at these regular annual meetings only the general routine of business is transacted, and the corporation passes from one year of its existence into the next with the by-laws regulating the number of its directors and its general management unchanged. A majority of the stockholders rarely attend in person. Their proxies are given to attorneys to vote for them on the usual and ordinary questions and matters that arise. * * * *
>
> A change in the by-laws increasing the number of directors of a corporation, being manifestly of great importance, extraordinary, and out of the usual business transacted at a regular or annual meeting of

On page 425 of the same cause the court further said:

> "At the next annual meeting after the date of said certificate, which was held September 6, 1887, an attempt was made to change said by-laws.
>
> There is evidence tending to show that notice of said annual meeting was sent to many of the members of the association, but whether such notice was sent to Windover does not appear, nor is it shown whether he was present at the meeting, either in person or by proxy. Nor is there any evidence that such notice was sent to any member for the purpose of the meeting would be to alter or amend the by-laws. [illegible]
>
> Trial court was justified in holding that the attempted change in the by-laws was not binding on Windover, and that the rights of the plaintiff are subject to the by-laws as they stood at the time said certificate was issued."

In Begley, et al vs Home Oil Company, et al, 221 Ga. 76, 80 S.E. Rep. 760 the court discusses the necessity and propriety of a notice to the members where there is to be any change in the basic laws of the corporation regardless of whether or not there is a by-law providing for such notice. This case involved a corporation for pecuniary profit but the reasons for the rule there [illegible].

> "Upon the by-laws, as adopted and regulating the affairs of a corporation in which a stockholder has invested his money, he relies for a contract as thereon provided, and it is not reasonable that even at a regular or annual meeting radical changes should be made without notice to him of such contemplated action. By experience and observation we know that at these regular annual meetings only the general routine of business is transacted, and the corporation passes from one year or its existence into the next with the by-laws regulating the number of its directors and its general management unchanged. A majority of the stockholders usually attend in person. Their proxies are given to attorneys to vote for them on the usual and ordinary resolutions and matters that arise.
>
> [illegible] of a [illegible], [illegible] and of the usual matters transacted at a regular or annual meeting of

> the stockholders, the weight of authority seems to be, as it ought to be, that, in the absence of notice previously given, it cannot be made."

Without extending this opinion any further we conclude that the amendment made in December 1925 to Article IX was in full force and effect at the time of the December meeting in 1926 of the members of the corporation; that Article XVIII of the constitution and Section XII of the by-laws were not complied with previous to the meeting in December 1926; that a failure to comply with Article XVIII of the constitution and Section XII of the by-laws or either of them, is fatal to the contention of the appellant.

It is also contended by appellant that Luthy, the relator, is estopped from prosecuting this proceeding by reason of the fact that he participated in some of the meetings held subsequent to the alleged amendment of Article IX of the by-laws at the meeting in December, 1926. It will be remembered that this proceeding is brought by the People of the State of Illinois and by the state's attorney and an estoppel therefore does not run against the People even though there would be a relator who by his actions might be estopped.

The decision herein is decisive of the cases of The People at the relation of Luthy vs J. R. Pfander, and of The People, at the relation of Luthy vs W. A. Terpening.

We conclude therefore, that the judgment of the Circuit Court of Peoria County should be affirmed, which is accordingly done.

Judgment Affirmed.

the stockholders, the weight of authority seems to be, as it ought to be, that, in the absence of notice previously given, it cannot be made."

Without discussing Bill Brown's "Report of Decisions" [illegible]

that the amendment made in December 1880 to Article IX was in full force and effect at the time of the December meeting in 1880 of the members of the corporation; that Article XVIII of the constitution and Section XII of the by-laws were not complied with previous to the meeting in November 1880; that a failure to comply with Article XVIII of the constitution and Section XII of the by-laws or either of them, is fatal to the contention of the appellant.

It is also contended by appellant that Darby, the relator, is estopped from prosecuting this proceeding by reason of the fact that he participated in some of the meetings held subsequent to the alleged amendment of Article IX of the by-laws at the meeting in December, 1880. It will be remembered that this proceeding is brought by the People of the State of Illinois and by the state's attorney and on estopped. Therefore does not run against the People even though there would be a relator who by his actions might be estopped.

The decision herein is decisive of the cases of The People at the relation of Darby vs. R. Thunder, and of The People, at the relation of Darby vs. W. A. Harpending.

We conclude therefore, that the judgment of the Circuit Court of Peoria County should be affirmed, which is accordingly done.

Affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

_____
Clerk of the Appellate Court

(53761—3M—7-27)

Calloway Co

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the ~~fourth~~ seventh day of ~~October~~ February, in the year of our Lord one thousand nine hundred and twenty-~~seven~~ eight, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On FEB 11 1928 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 7790 Agenda 61.

APRIL TERM 1927

WILLIAM H. WINGET,

Appellee,

-vs-

GEORGE W. CHESSMAN,

Appellant.

APPEAL FROM THE CIRCUIT COURT OF PEORIA COUNTY

Jett, P. J.

This suit was instituted by William H. Winget, appellee, in the Circuit Court of Peoria County against George W. Chessman, appellant, to recover damages for injuries claimed to have been suffered by him on February 5th, 1926, in a collision alleged to have been the result of negligence on the part of appellant. A jury trial was had with a finding in favor of appellee in the sum of $10,000., on which finding judgment was rendered and the appellant prosecutes an appeal to this court.

The amended declaration consists of six counts. The first count charges that on February 5th, 1926, the defendant was operating his automobile in a northerly direction along Jackson street near the intersection of Madison street in the City of Peoria, and that Charles Winget was possessed of and operating an automobile in a southwesterly direction along Madison Street at or near the intersection thereof with Jackson street, and that the plaintiff was riding in an automobile operated by Charles Winget as a guest of said Charles Winget and was in the exercise of due care and caution for his own safety. The count then charges general negligence on the part of the defendant in the operation of his automobile and as a result of the negligence of the defendant the automobile in

Docket No. 7785 Opinion 13.

APRIL TERM 1927

WILLIAM H. WINGET,

Appellee,

-vs-

GEORGE V. CHESSMAN,

Appellant.

APPEAL FROM THE CIRCUIT COURT OF PEORIA COUNTY

Tuth, P. J.

This suit was instituted by William H. Winget, appellee, in the Circuit Court of Peoria County against George W. Chessman, appellant, to recover damages for injuries claimed to have been suffered by him on February 5th, 1926, in a collision claimed to have been the result of negligence on the part of appellant. A jury trial was had with a finding in favor of appellee in the sum of $10,000., on which finding judgment was rendered and the appellant prosecutes an appeal to this court.

The amended declaration consists of six counts. The first count charges that on February 5th, 1926, the defendant was operating his automobile in a northerly direction along Jackson street near the intersection of Madison street in the city of Peoria, and that Charles Winget was presented at and preparing to cross- ing in a southwesterly direction along Madison street at or near the intersection thereof with Jackson street, and that the plaintiff was riding in an automobile operated by Charles Winget as a guest of said Charles Winget and was in the exercise of due care and caution for his own safety. The count then charges general negligence on the part of the defendant in the operation of his automobile and as a result of the negligence of the defendant the automobile in

which the plaintiff was riding was struck by the defendant's automobile at the intersection of said streets and the plaintiff was severely injured.

The second count alleges that the plaintiff was the guest of Charles Winget and charges the defendant with a violation of the statute regulating speed of automobiles and that the defendant drove his automobile at a greater rate of speed than was then and there reasonable and proper having regard for the use of the way, etc., to-wit: at a rate of speed in excess of fifteen miles per hour, to-wit: at a rate of thirty miles an hour.

In the third count it is averred that the plaintiff was riding in an automobile of Charles Winget as his guest and charges as negligence the failure of the defendant to give the right-of-way to the automobile in which the plaintiff was riding at the intersection of Madison street and Jackson street, contrary to the provisions of the statute.

The fourth count is the same as the first except that it charges that both the plaintiff and the driver of said automobile at the time the plaintiff received the injuries complained of were in the exercise of due care and caution.

The fifth count alleges that at the time of the injuries complained of plaintiff was in the exercise of due care and caution for his own safety and that the driver of the car was also in the exercise of due care and caution for the safety of the plaintiff and that the defendant violated the law with reference to speed.

The sixth count charges that at the time the injuries complained of the plaintiff was in the exercise of due care and caution for his own safety and the driver was in the exercise of due care and caution for the safety of the plaintiff and that the defendant failed to give the right-of-way to the automobile in which the

which the plaintiff was riding was struck by the defendant's automobile at the intersection of said streets and the plaintiff was severely injured.

The second count alleges that the plaintiff was the guest of Charles Jungst and charges the defendant with a violation of the statutes regulating speed of automobiles and that the defendant drove his automobile at a greater rate of speed than was lawful and there was reasonable and proper leeway for the use of the way, etc., to-wit: at a rate of speed in excess of fifteen miles per hour, to-wit: at a rate of thirty miles an hour.

In the third count it is averred that the plaintiff was riding in an automobile of Charles Jungst as his guest and charges negligence the failure of the defendant to give the right-of-way to the automobile in which the plaintiff was riding at the intersection of Hudson street and Jackson street, contrary to the provisions of the statute.

The fourth count is the same as the first count but it charges that both the plaintiff and the driver of said automobile at the time the plaintiff received the injuries complained of were in the exercise of due care and caution.

The fifth count alleges that at the time of the injuries complained of plaintiff was in the exercise of due care and caution for his own safety and that the driver of the car was also in the exercise of due care and caution for the safety of the plaintiff and that the defendant violated the law with reference to speed.

The sixth count charges that at the time the injuries complained of the plaintiff was in the exercise of due care and caution for his own safety and the driver was in the exercise of due care and caution for the safety of the plaintiff and that the defendant failed to give the right-of-way to the automobile in which the

plaintiff was riding contrary to the law.

To the amended declaration the defendant pleaded the general issue.

It appears that the appellee is 48 years old and is a practicing dentist and has resided in the City of Peoria for sixteen years. The record discloses that the appellant is a minister of the Gospel and has resided in Peoria for the past four years, being Pastor of the First Baptist Church. The injuries complained of by appellee were the result of a collision of two automobiles which took place at the intersection of Madison street and Jackson street, being two public streets in the City of Peoria, on the evening of February 5th, 1926, about the hour of 9:30. Madison street runs in a northerly and southerly direction and is intersected at right angles by Jackson street which runs in an easterly and westerly direction. Madison street is of the width of about forty feet at the intersection and Jackson street of about thrity-four feet. On the northwest corner of this intersection a large building is located known as the Spaulding Institute; a residence on the northeast corner; an apartment on the southeast corner, and a Presbyterian Church on the southwest corner. Jefferson and Adams streets are one and two blocks east from Madison street respectively and parallel with it.

On the evening in question there had been a basket-ball game between two local schools at the armory which is located two blocks north and two blocks east of the intersection of the streets in question, and all of the parties to this proceeding had attended the basket-ball game.

Appellee and his wife went in a Ford automobile operated by the son Charles Winget and alleged to have been owned by him.

Appellant and his wife and small son went to the game in

plaintiff was filing contrary to the law.

To the amended declaration the defendant pleaded the general issue.

It appears that the appellee is 48 years old and is a practicing dentist and has resided in the City of Peoria for sixteen years. The record discloses that the appellee is a member of the Gospel and has resided in Peoria for the past four years, being leader of the First Baptist Church. The injuries complained of by appellee were the result of a collision of two automobiles which took place at the intersection of Madison street and Jackson street, being two public streets in the City of Peoria, on the evening of February 6th, 1928, about the hour of 9:30. Madison street runs in a northerly and southerly direction and is intersected at right angles by Jackson street which runs in an easterly and westerly direction. Madison street is of the width of about forty feet at the intersection and Jackson street of about thirty-four feet. On the northwest corner of this intersection a large building is located known as the Spaulding Institute; a residence on the northeast corner; an apartment on the southeast corner, and a Presbyterian Church on the southwest corner. Jefferson and Adams streets are one and two blocks east from Madison street respectively and parallel with it.

On the evening in question there had been a basket-ball game between two local schools at the armory which is located two blocks north and two blocks east of the intersection of the streets in question, and all of the parties to this proceeding had attended the basket-ball game.

Appellee and his wife went in a Ford automobile operated by the son Charles Winget and alleged to have been owned by him. Appellant and his wife and small son went to the game in

a Buick Sedan operated by appellant.

After the game appellee and his wife got into the back seat of the automobile and the son sat in front and drove the car. They proceeded up what is known as Hancock street to Madison street, turned to the left and drove in a southerly direction toward the intersection of Madison and Jackson streets.

Appellant and his family left the armory after the game was over and proceeded in a southerly direction along Adams street to Jackson street, then turned to his right toward the intersection in question.

The evidence is conflicting as to the manner in which the collision took place.

The principal reasons argued for a reversal are,(1) the verdict is against the manifest weight of the evidence in that it is contrary to the undisputed physical facts; (2) improper instructions were given on the part of appellee; (3) improper conduct of counsel for appellee during the progress of the trial and in the closing arguments.

The first error argued by appellant in support of his contention for a reversal of the judgment is that the verdict is against the manifest weight of the evidence. Owing to the conclusion we have reached, we do not deem it necessary to enter upon a discussion of the evidence, and we refrain from expressing any opinion thereon.

It is insisted by the appellant that instruction number 16 given on the part of appellee is erroneous and should not have been given without being limited to certain counts of the declaration. Instruction number 16 reads as follows:

A brick table identical in appearance.

Then the same appellee and his wife got into the back seat of the automobile and the car went in front and leaves the car. Just preceding my death is known as Jackson street to Madison street, turned to the left and drove in a southerly direction toward the intersection of Madison and Jackson streets.

Appellant and his family left the armory after the game was over and proceeded in a southerly direction along Jackson to Madison street, then turned to the right toward the intersection in question.

The evidence is conflicting as to the manner in which the collision took place.

The principal witnesses called for a contract are, (1) the verdict is against the manifest weight of the evidence in that it is contrary to the undisputed physical facts; (2) improper instructions were given on the part of appellee; (3) improper admission of counsel for appellee during the progress of the trial and in the closing argument.

The first issue raised by appellant in support of his contention for a reversal of the judgment is that the verdict is against the manifest weight of the evidence. Prior to the conclusion we have reached, we do not deem it necessary to enter upon a discussion of the evidence, but we indicate our conclusion upon the question involved.

It is insisted by the appellant that instruction number 10 gives an idea of negligence in concurrence and should not have been given without being limited to certain counts of the declaration. Instruction number 10 reads as follows:

> "The court instructs the jury that if you believe from the greater weight of all the evidence that the plaintiff in this case exercised that degree of care and caution for his own personal safety, at and immediately prior to the injury in question, that an ordinarily careful and prudent person would have exercised under the same or similar circumstances, then the plaintiff was in the exercise of due care."

It is insisted that this instruction should not have been given because it was not limited to the three counts which charge that appellee was riding as an invited guest. We have examined the instruction in this connection and are of the opinion that the court did not commit any reversible error in giving the same for the reason that all it undertakes to do is define what would amount to the exercise of care in so far as appellee himself was concerned.

It is next contended that the court erred in refusing to give the second and third instructions tendered by appellant. These two instructions would have allowed the jury to have found against appellee whether he was an invited guest or not if the driver of the automobile in which appellee was riding could, by the use of ordinary care have prevented the collision in question and that he did not do so and by reason thereof the collision occurred. In our opinion these two instructions when considered with the issues presented in this cause do not state correct principles of law and the court did not err in refusing to give them.

Next it is urged that the judgment should be reversed because of the conduct of counsel for appellee throughout the trial and the improper and prejudicial remarks made by them during the argument. This assignment of error presents a more serious

> "The court instructs the jury that if you believe from the greater weight of all the evidence that the plaintiff in this case exercised that degree of care and caution for his own personal safety, at and immediately prior to the injury in question, that an ordinarily careful and prudent person would have exercised under the same or similar circumstances, some the plaintiff was in the exercise of his care."

It is insisted that this instruction should not have been given because it was not limited to the three courses which charge that appellee was riding as an invited guest. We have examined the instruction in this connection and are of the opinion that the court did not commit any reversible error in giving the same for the reason that all it undertakes to do is define what would amount to the exercise of care in so far as appellee himself was concerned.

It is also contended that the court erred in refusing to give the second and fourth instructions requested by appellant. These two instructions would have allowed the jury to have found against appellee whether he was an invited guest or not if the driver of the automobile in which appellee was riding could, by the use of ordinary care have prevented the collision in question and that he did not do so and by reason thereof the collision occurred. In our opinion these two instructions when considered with the issues presented in this cause do not state correct principles of law and the court did not err in refusing to give them.

Next it is urged that the judgment should be reversed because of the admission of improper and prejudicial remarks made by plaintiff and the improper and prejudicial remarks made by plaintiff during the argument. This contention of error presents a more serious

question than has been heretofore discussed. The record discloses that counsel for appellee in the closing argument among other things said: "When young Winget was on the stand he told his story, which if true, you have got to find for us without any other witnesses. If what young Winget told you is the truth, we have got to win. Mr. Heyl told you that he had a written statement signed by Mr. Winget that would show he didn't tell the truth. Where is it?

Counsel for appellant then stated: I never asked about a written statement.

Counsel for appellee then continued: Oh yes you did. Didn't you sign a statement so and so? He said he did. I have a copy of it and I will tell you what I will do in order to show you I want to be fair. I can't introduce it to the jury so they can see it, that wouldn't be right for me. They could do it and I could not. If you have lost your copy I haven't and if you agree we will open this case up and let's introduce that statement to the jury if you want it in.

Counsel for appellant then said: I am going to object to this line of argument as something not in evidence in the case and it is prejudicial and I except to the statement as prejudicial. There ought to be some limit to this argument.

Counsel for appellee then said: Haven't I got the right? He says he has got a statement but he didn't put it in.

Counsel for appellant: I object to the last statement also and would like the court to rule on it and I would like to have an opportunity to object without being interrupted.

The court: The counsel must confine himself to the evidence. He can comment on the matters that he didn't put in

question than has been mentioned heretofore. The record discloses that counsel for appellee in his closing argument among other things said: "Does young Tuyer sit on the witness to tell his story, which is true, you have got to find two or three other witnesses. If most young Tuyer tell lies in the truth, we have got to win. Mr. Tuyl told you that he had a written statement signed by Mr. Winget that would show he didn't tell the truth. Where is it?

Counsel for appellant then stated: I never asked about a written statement.

Counsel for appellee then continued: Oh yes you did. Didn't you also a statement as and so? He said he did. I have a copy of it and I will tell you what I will do in order to show you I want to be fair. I can't introduce it to the jury so they can see it, that wouldn't be right for me. They could do it and I could not. If you have lost your case I haven't and if you guess we will open this case up and let's introduce that statement to the jury if you want it in.

Counsel for appellant then said: I am going to object to this line of argument as something not in evidence in the case and it is prejudicial and I except to the statement as prejudicial. There ought to be some limit to this argument.

Counsel for appellee then said: Haven't I got the right? He says he has got a statement but he didn't put it in.

Counsel for appellant: I object to that last statement also and would like the court to rule on it and I would like an opportunity to object without being interrupted.

The court: The counsel must confine himself to the evidence. He can comment on the matters that he didn't put in

evidence or neglected to put in evidence but that is as far as you can go.

Counsel for appellee: He neglected to put it in. I want the record to show -- I want the record to show this too. Have I got the right when he seeks to give this jury the impression that he has got a statement signed by Charles Winget that will prove he is a liar and he doesn't put it in, I want the court to rule whether I can tell the jury that.

Counsel for appellant: I want to object to that statement as prejudicial, not based upon the record, and I except to it as an improper and prejudicial remark made for the purpose of inflaming the jury.

The Court: Counsel may make statements on the evidence in the record, but the offer to prove the matter is not a matter that is before the jury at this time. Outside of that the balance of the statement of counsel would be competent.

Counsel for appellee: Your Honor, I never offered it. I merely said I wanted it in if he had forgotten it.

Counsel for appellant: There is no statement in evidence or statement identified. He has no right to tell the jury what is in some statement he has in his book.

The court: Counsel cannot tell the jury of anything not in evidence.

Counsel for appellee: I haven't told the jury anything that is in it but the reason they didn't put it in is because they didn't want it in evidence.

Counsel for appellant: I object to that statement as improper.

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Counsel for appellee: He neglected to put it in. I want the record to show -- I want the record to show this too. Have I got the right when he seems to give this jury the impression that he has got a statement signed by Charles Hinget that will prove he is a liar and he doesn't put it in, I want the court to rule whether I can tell the jury that.

Counsel for appellant: I want to object to that statement as prejudicial, not based upon the record, and I except to it as an improper and prejudicial remark made for the purpose of inflaming the jury.

The Court: Counsel may make statements on the evidence in the record, but the offer to prove the matter is not a matter that is before the jury at this time. Outside of that the balance of the statement or counsel would be competent.

Counsel for appellee: That means, I have already stated it. I merely said I wanted it in if he had forgotten it.

Counsel for appellant: There is no statement in evidence or statement identified. He has no right to tell the jury what is in some statement he has in his book.

The court: Counsel cannot tell the jury or anything not in evidence.

Counsel for appellee: I haven't told the jury anything that is in it but the reason they didn't put it in is because they didn't want it in evidence.

Counsel for appellant: I object to that statement as improper.

The court: That is comment upon the evidence.

Counsel for appellee: I have tried these cases for twenty years and I want that in the record myself for the benefit of any court of appeal, Mr. Heyl. I put that in deliberately. I want another court to rule on who is trying to be fair. All right, thats that.

There is nothing in the record that would authorize the argument or statement made by counsel for appellee. Counsel for appellant did not ask the witness on cross-examination anything about a written statement. The question asked of young Winget by appellant was: "Did you ever tell anyone that there was a car passed you as you proceeded across that intersection?

Counsel for appellee made the following objection: I object to that. Let him name the person he told it to if they want to go into that phase.

The court: Objection sustained.

The statement made by counsel for appellee in his closing argument left the impression evidently with the jury that appellant feared to produce a statement and let the jury see it claiming to have a copy of the statement and offering to permit it to be used if appellant's copy had been lost.

It will be observed that counsel for appellee said: "Haven't I got the right. He says he has got a statement but he didn't put it in," and when objection was made by appellant the court said: "Counsel must confine himself to the evidence. He can comment on the matters that he didn't put in the evidence or neglected to put in evidence but that is as far as you can go." Immediately after that counsel for appellee replied: "He neglected to put it in." Objection was again made by-appellant. Counsel for

The court: That is sustained upon the evidence.

Counsel for appellee: I have tried these cases for twenty years and I would like in the record specify for the benefit of any court or appeal, etc. Here: I put that in parenthesis. I want another court to rule on who is trying to be fair. All right, there that.

There is nothing in the record that would authorize the argument or statement made by counsel for appellee. Counsel for appellant did not ask the witness on cross-examination mentioning about a written statement. The question asked of young Hiegel by appellant was: "Did you ever tell anyone that there was a car passed you as you proceeded across that intersection?"

Counsel for appellee said the following objection:

I object to that. Let it seem the witness has said it so it can want to go into that phase.

The court: Objection sustained.

The statement made by counsel for appellee in his closing argument left the impression strongly with the jury that appellant feared to produce a statement and let the jury see it claiming to have a copy of the statement and offering to permit it to be read if appellant's copy had been lost.

It will be observed that counsel for appellee said: "Haven't I got the right. He says he has got a statement but he didn't put it in," and when objection was made by appellant the court said: "Counsel must confine himself to the evidence. He can comment on the matters that he didn't put in the evidence or neglected to put in evidence but that is as far as you can go." Immediately after that counsel for appellee replied: "I neglected to put it in." Objection was again made by appellant. Counsel for

appellee replied: "I want the record to show this too. Have I got the right? He seeks to give the jury the impression that he has got a statement signed by Charles Winget that will prove that he is a liar and he didn't put it in. I want the court to rule whether he can tell the jury that." This was objected to by counsel for appellant on the ground that it was improper and a prejudicial remark and not based upon the record and made for the purpose of inflaming the jury. The court in effect approved the argument by making the following statement: "Counsel may make statements on the evidence in the record, but the offer to prove the matter is not a matter before the jury at this time. Outside of that the balance of the statement of counsel would be competent." By holding that the balance of the statement was correct the court approved and sanctioned the statements of counsel. Naturally such a statement repeated by counsel and approved by the court would have great weight with the jury. Counsel for appellee then continued: "Your Honor, I never offered it, I merely said I wanted it in if he had forgotten it." This statement was objected to and the court admonished counsel not to tell the jury anything not in evidence and counsel for appellee continued: "I haven't told the jury anything that is in it but the reason they didn't put it in is because they didn't want it in evidence, which is a continuation of the argument based upon something not in evidence and was entirely improper. Again counsel for appellant objected to the statement as improper and the court approved the same by saying, "that is comment upon the evidence."

In addition to the argument and rulings set out, other statements were made by counsel for appellee that appellant insists were erroneous. We will not extend this opinion, however, by quoting

appellee replied: "I want the record to show this too. Have I got the right? He seems to give the jury the impression that he has got a statement signed by Charles Winget that will prove that he is a liar and he didn't put it in. I want the court to rule whether he can tell the jury that." This was objected to by counsel for appellant on the ground that it was improper and a prejudicial remark and not based upon the record and made for the purpose of inflaming the jury. The court in effect approved the argument by making the following statement: "Counsel may make inferences on the evidence in the record, but the effort to prove the matter is not a matter before the jury at this time. Outside of that the balance of the statement of counsel would be competent." By holding that the balance of the statement was correct the court approved and sanctioned the statements of counsel. Naturally such a statement repeated by counsel and approved by the court would have great weight with the jury. Counsel for appellee then continued: "Your Honor, I never offered it, I merely said I wanted it in if he had forgotten it." This statement was objected to and the court admonished counsel not to tell the jury anything not in evidence and counsel for appellee continued: "I haven't told the jury anything that is in it but the reason they didn't put it in is because they didn't want it in evidence, which is a continuation of the argument based upon something not in evidence and was entirely improper. Again counsel for appellant objected to the statement as improper and the court approved the same by saying, "that is comment upon the evidence."

In addition to the argument and remarks set out, other statements were made by counsel for appellee that appellant insists were improper. He also made [illegible] remarks, by [illegible]

further from the argument. The question now is, was the argument presented and the action of the court such as was calculated to improperly influence the jury?

In Bishop vs Chicago Junction Ry. Co. 289 Ill. 63, the court discusses the conduct of counsel. In that proceeding during cross-examination of one of the witnesses, counsel sought to impeach the witness by inference that he was reading from the witness' statement and that when opposing counsel objected to such use of a statement before the jury, counsel for defendant in error replied: "I will offer this to the jury if you consent." Upon objection and exception to such statement the trial court said: "You have a right to consent, haven't you?" In the decising of the case the court, at page 68, said:

> "This was clearly an improper statement on the part of both the court and counsel for the defendant in error. It is not contended that the paper was competent to go before the jury when this statement was made. The evident effect and the apparent purpose of such a statement in the presence of the jury was to cause them to feel that the plaintiff in error was afraid to have said paper read to them. Such contention was improper and prejudicial to plaintiff in error and the court should have sustained counsel's objection thereto and admonished the jury concerning the same."

In Apple vs Chicago City Ry. Co. 259 Ill. 561, a judgment of the lower court was reversed for misconduct of counsel. In that case at page 567 the court said:

> "In a clear case, however, this court will reverse a judgment because of the improper conduct of counsel, and has reversed judgments because of prejudicial statements of counsel even though the trial court has sustained objections to such statements, rebuked counsel and directed the jury to disregard the statements. (Wabash Railroad Co. v. Billings, 212 Ill. 37; Chicago Union Traction Co. v. Lauth, 216, id. 176.)"

Without citing further authority we are of the opinion

that the remarks made during the argument of the case by counsel for appellee together with the rulings thereon by the court are such as were calculated to prejudice and influence the jury, and that reversible error was committed. In so holding we do not undertake to approve all that counsel for appellant may have said or done during the progress of the trial but his conduct was not such as would estop appellant from arguing as error the remarks and conduct of counsel for appellee on the trial of the cause.

We are of the opinion that the judgment of the Circuit Court of Peoria County should be reversed and the cause remanded, which is accordingly done.

Reversed and remanded.

that the remarks made during the argument of the case by counsel for appellee together with the rulings thereon by the court are such as were calculated to prejudice and influence the jury, and that reversible error was committed. In so holding we do not [illegible] to approve all that counsel for appellant may have said or done during the progress of the trial but his conduct was not such as would estop appellant from claiming as error the remarks and conduct of counsel for appellee on the trial of the cause.

We are of the opinion that the judgment of the Circuit Court of Peoria County should be reversed and the cause remanded, which is accordingly [illegible].

Reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

_____

Clerk of the Appellate Court

(53761—3M—7-27)

abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of February, in the year of our Lord one thousand nine hundred and twenty-eight, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On FEB 23 1928 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Cecelia Voegele, and Hugo Voegele, Appellees,	:	
	:	Appeal from Circuit Court of Peoria County.
v.	:	
John Zerwekh, Jr. Appellant,	:	

Jones J:

Joe Togo entered into possession of certain premises in the city of Peoria under a written lease from appellees. The following memorandum is written on the instrument: "For and in consideration of the leasing of the within described premises to Joe Togo, we unconditionally guarantee the full performance of this lease including the payment of the rent reserved and all other covenants and conditions therein." This memorandum is signed by Togo and John Zerwekh Jr., the appellant. Togo defaulted in the payment of rent after the expiration of about nine or ten months and this suit was brought upon the above guaranty.

The declaration consists of the common indebitatus money counts. With it was filed an affidavit of plaintiff's claim setting up that the demand was for rent due on the premises and that it was guaranteed in writing by the defendant. A bill of particulars containing a copy of the lease and guaranty was also filed. Appellant filed the general issue with an affidavit of defense attached setting up that he had signed the contract of guaranty with the express understanding that two co-guarantors would join with him; that they had failed to do so; and that the consideration for his contract of guaranty, if any, had failed. A jury returned a verdict for appellees, and judgment was entered thereon for $1050. The appeal is from that judgment.

Appellant contends that there is no competent evidence in the record to sustain the declaration, and that under the statute, neither of appellees, being husband and wife, was a competent witness. Cecelia Voegele was

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The declaration consists of the common indebitatus money counts. With it was filed an affidavit of plaintiff's claim setting up that the demand was for rent due on the premises and that it was guaranteed in writing by the defendant. A bill of particulars containing a copy of the lease and guaranty was also filed. Appellant filed the general issue with an affidavit of defense attached setting up that he had signed the contract of guaranty with the express understanding that two co-guarantors would join with him; that they had failed to do so; and that the consideration for his contract of guaranty, if any, had failed. A jury returned a verdict for appellees, and judgment was entered thereon for $1050. The appeal is from that judgment.

Appellant contends that there is no competent evidence in the record to sustain the declaration, and that under the statute, neither of appellees, being husband and wife, was a competent witness. Cecelia Voegele was

she and Hugo Voegele owned the other portion, as tenants in common. The evidence shows that Cecelia Voegele kept the account of rents and gave receipts for all payments made. She was competent to testify concerning her own separate estate and to all matters in which she acted as agent for her husband. Likewise he was a competent witness in his own behalf.

The question of whether or not appellant signed the guaranty with the understanding with both appellees that it was also to be signed by two other guarantors was one of fact and the testimony was conflicting. The jury found against the contention of appellant. It is unnecessary to review the evidence on this question. The jury and the trial judge saw and heard the witnesses testify, and we cannot say that the verdict is manifestly against the weight of the evidence. A verdict of a jury based upon conflicting facts will not be disturbed by a court of review, unless it is clearly contrary to the weight of the evidence. (Mandelkow v. Meyer 219 Ill. App. 286.)

We think that appellees were also competent to testify to this alleged agreement. (McBride v. Seney 192 Ill. App. 18.) They were both parties to the suit as well as to the guaranty memorandum and each of them had a right to testify concerning the alleged understanding. Where the evidence in an action brought by a husband and wife on a contract tends to show that the wife has a joint interest in the contract, it is erroneous to refuse to allow her to testify. (Harding v. Mitchell 202 Ill. App. 442; Kelly v. Hale 59 id. 568; Vercler v. Jansen 96 id. 328.)

The claims that the declaration is insufficient, that there is a variance between it and the proof, and that it will not sustain the judgment, are based upon the contention that none of the common counts have been proven and that such a guaranty, as is here involved, must be declared upon specially. In a suit upon a collateral undertaking, the common counts are not suf-

tomson. The evidence tends that Dwelle kept the accounts of Peale and gave notwithstanding for all payments made. She was competent to testify concerning her own separate estate and to all matters in which she acted as agent for her husband. Likewise he was a competent witness in his own behalf.

The question of whether or not appellant signed the guaranty with the understanding with both appellees that it was also to be signed by two other guarantors was one of fact and the testimony was conflicting. The jury found against the contention of appellant. It is unnecessary to review the evidence on this question. The jury and the trial judge saw and heard the witnesses testify, and we cannot say that the verdict is manifestly against the weight of the evidence. A verdict of a jury based upon conflicting facts will not be disturbed by a court of review, unless it is clearly contrary to the weight of the evidence. (Mundelkow v. Meyer 112 Ill. App. 604.)

We think that appellees were also competent to testify to this alleged agreement. (McFadie v. Seney 192 Ill. App. 18.) They were both parties to the suit as well as to the guaranty memorandum and each of them had a right to testify concerning the alleged understanding. Where the evidence in an action brought by a husband and wife on a contract tends to show that the wife has a joint interest in the contract, it is erroneous to refuse to allow her to testify. (Dreiling v. Mitchell 202 Ill. App. 442; Kelly v. Hale 39 id. 382; Verdier v. Tuman 32 id. 318.)

The claims that the declaration is insufficient, that there is a variance between it and the proof, and that it will not sustain the judgment, are based upon the contention that none of the common counts have been proven and that such a guaranty, as is here involved, must be declared upon specially. In a suit upon a collateral undertaking, the common counts are not sufficient

ficient, and the breach relied upon must be specially pleaded, but in a case of absolute guaranty, a recovery can be had under the common counts in assumpsit. (16 Ency. Pleading and Practice, Principal and Surety or Guarantor, page 939; Runde v. Runde 59 Ill. 98; Power v. Rankin 114 id. 52; Brand v. Whelan 18 Ill. App. 186; Adams & Westlake Co. v. Westlake Co. 92 id. 616.) The contract of guaranty in this case was an original undertaking, (Johnson v. Glover 19 Ill. App. 585; Gridley v. Copen 72 Ill. 11; Gage v. Mechanic's National Bank of Chicago, 79 id. 62; Taussig v. Reid 145 id. 488.) and was admissible in evidence under the common counts. (Johnson v. Glover, supra; 28 C.J. Guaranty 1023.) It was fully executed on the part of appellees and where a contract has been fully executed and nothing further remains to be done under it, but the payment of money, it may be read in evidence, (Lane v. Adams 19 Ill. 167) and indebitatus assumpsit under the common counts will lie. (2 R.C.L. Assumpsit 762; Lane v. Adams, supra; Shephard v. Mills 173 Ill. 223; Foster v. McKeown 192 id. 339.)

It is conceded that the lease and guaranty memorandum were signed and delivered by the parties at one and the same time and in the presence of each other; that thereafter the lessee went into possession of the leased premises; that he defaulted in the payment of rent; that appellant was notified of such default within a short time after it occurred, and that later he was notified that the aggregate amount of arrears was $1050. The possession of the lease and guaranty by appellees is prima facie evidence of its delivery; and the acquiescence on the part of appellant in its retention by appellees without taking any steps to procure its return, affords strong evidence of its unconditional delivery, or if there was a condition to the delivery as that another person should sign the guaranty, that it was waived, or that it was only for the interest of appellees and to satisfy them and not one which was considered as of importance to the guarantors to be performed before he was willing the guaranty should be delivered and have effect.

but is a mere of absolute security, a recovery can be had under the common counts in assumpsit. (2 Chit. Pleading and Precedents, Principal and Surety or Guarantor, pages 1271; Frank v. Hunde 49 Ill. 98; Power v. Hamlin 114 Ill. 12; Hand v. Nelson 19 Ill. App. 186; Adams & Westlake Co. v. Ventlate Co. 98 id. 615.) The contract of guaranty in this case was an original undertaking. (Johnson v. Glover 19 Ill. App. 885; Gridley v. Doren 71 Ill. 11; Case v. Merchants National Bank of Chicago, 77 id. 67; Manning v. Bate 145 id. 158.) and was admissible in evidence under the common counts. (Johnson v. Glover, supra; 28 U.A. Summary 1023.) It was fully proved on the part of appellees and where a contract has been fully executed and nothing further remains to be done under it, but the payment of money, it may be read in evidence. (Lane v. Lane 17 Ill. 167) and indebitatus assumpsit under the common counts will lie. (2 C.J.S. Assumpsit 77; Lane v. Lane, supra; Shepard v. Mills 173 Ill. 382; Foster v. McKown 192 id. 389.)

It is conceded that the lease and guaranty memorandum were signed and delivered by the parties at one and the same time and in the presence of each other; that thereafter the lessee went into possession of the leased premises; that he defaulted in the payment of rent; that appellant was notified of such default within a short time after it occurred, and that later he was notified by the appellees demand of arrears was made. The possession of the lease and guaranty by appellees is prima facie evidence of its delivery; and the acquiescence on the part of appellant in its retention by appellees without making any steps to procure its return, affords strong evidence of its unconditional delivery, or if there was a condition to the delivery as to a resident person which also the guaranty, that it was waived, or that it was well for the delivery of appellees and to ability then and not one which was unobserved as of importance to the guarantors to be performed before he was willing the guaranty should be delivered and acted upon.

(Comstock, et al, v. Gage 91 Ill. 328.) It appears from the evidence that appellee, Hugo Voegele, repeatedly demanded that appellant pay the amount of rent which was in default, but it nowhere appears that at any of such times appellant claimed the guaranty was not binding upon him because it was not signed by two other guarantors.

In our view, the judgment of the circuit court should be affirmed.

Judgment affirmed.

(Gardner, 19 Ed. 2, Note 21 III, 220.) If appears from the evidence that appellee, Dan Vogel, intentionally damaged the equipment and the amount of damages was in dispute, but it appears clearly that it did not at such time qualified to give the opinion upon his measure of the damages by the other testimony.

In our view, the judgment of the circuit court should be affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and twenty-_____

_____

Clerk of the Appellate Court

(53761—3M—7-27)

General No. 8124 Agenda No. 50

Millard F. Dunlap, Appellee.

vs.

James M. Myers, Ella Dean Myers, William A. Tarzwell, William J. Myers, Rose E. Myers, James M. Myers as Guardian for William J. Myers and Rose E. Myers, Houston R. Ward, Appellants.

Appeal from Morgan.

NIEHAUS, J.

Millard F. Dunlap, the appellee, filed a bill in equity for the foreclosure of a mortgage which was executed and delivered to him for the benefit of the Ayers National Bank by James M. Myers, in the circuit court of Morgan county. The appellee also prays, to have the mortgage reformed so as to include the south half of lots 42 and 43 in the original plat of the Town of Murrayville as a part of the property intended by the parties to be included in the mortgage. The bill prays, that an account may be taken by and under the direction of the court; and that the mortgage may be reformed, and when so reformed shall include as a part of the mortgaged premises the south half of lots 42 and 43 in the original plat of the town (now village) of Murrayville, Illinois; and that a receiver may be appointed to take charge of said real estate and to collect the rents; and issues and profits thereof during the pendency of this proceeding; that the said defendant James M. Myers may be required to pay to your orator whatever sum shall appear to be due to him upon the taking of such account, together with the costs of this proceeding, by a short day to be fixed by the court, and in default of such payment, said mortgage premises may be sold as the court may direct, to satisfy such debt, interest and costs; and that in case of said sale and a failure to redeem therefrom, pursuant to the statute, the defendants and all persons

claiming by, through or under them after the commencement of this suit, may be forever barred and foreclosed of all right or equity of redemption of said mortgaged property.

The allegations of the bill pertaining to the reformation of the mortgage, are as follows: "Complainant further represents that it was the intention agreement and understanding at the time said mortgage was made, that it should and did include the south half of lots forty-two (42) and forty-three (43) in the original plat of the town of Murrayville, Illinois; and complainant charges, that he is entitled to have said mortgage reformed so as to include south half of lots forty-two (42) and forty-three (43) and to have said mortgage foreclosed after the same shall have been reformed as aforesaid." The bill contains a number of allegations with reference to the purchase of the property which the appellee seeks to have included as part of the mortgaged premises; and there are allegations concerning the borrowing of the money by James M. Myers from the Ayers National Bank for the purpose of purchasing the property in question; and that James M. Myers represented to the appellee, that he was desirous of buying a house and lot for a home in the village of Murrayville; and that if the appellee would loan him the money, that when the transaction was completed, he would give the appellee a mortgage upon the real estate purchased; and that Myers in violation of his representation to the complainant, after making said purchase, took the title thereto in the name of his wife, Rose E. Myers, instead of taking the title thereto in himself. There are also allegations in the bill in reference to the death of Rose E. Myers, who died on February 17, 1920, seized of the property in question, leaving her husband and her children, some of which were minors, surviving her. There are also allegations in the bill referring to a partition proceeding commenced in the circuit court of Morgan county, to partition the premises in question after the death of Rose E. Myers; and to the sale of the premises by the Master in the partition pro-

ceedings, to the appellant William A. Tarzwell, who was the father of Rose E. Myers deceased; and averments to the effect that Tarzwell did not pay anything for the real estate, but simply took and held the same and holds the same in trust for the defendant James M. Myers. These allegations and a number of others of like character in the bill, with reference to financial transactions between the defendant James M. Myers and Tarzwell as purchaser, and with the Master in Chancery in reference to the payment of the purchase money for the property purchased by Tarzwell at the Master's sale, are obviously outside of the legal scope and purpose of the bill; and have no pertinent bearing upon the real issues involved, namely, the foreclosure of the lien of the mortgage on the property described herein; and the right to a reformation of the mortgage to include the south half of lots 42 and 43 mentioned as a part of the premises mortgaged. When the case was at issue, it was referred to the Master in Chancery, who made his report to the effect, that the appellee was entitled to a foreclosure of the mortgage, to secure an indebtedness of James M. Myers amounting to the sum of $14131.24; and entitled to a sale of the premises mortgaged to satisfy the mortgage lien; but that appellee was not entitled to have the mortgage reformed so as to include the south half of lots 42 and 43 in the town of Murrayville mentioned. Exceptions were filed by the appellee to that part of the findings of the Master denying his legal right to have the mortgage reformed; and these exceptions were sustained by the chancellor upon the hearing of the case; and a decree was thereupon entered reforming the mortgage so as to include the premises referred to; and also granting further relief upon the assumption that the appellee had the right in this foreclosure proceeding to reach the pecuniary interest of the defendant James M. Myers in the premises partitioned and purchased by Tarzwell at the Master's sale; also providing for the repayment to Tarzwell by the appellee of the money which the court finds he actually paid to the Master in Chancery for the premises

purchased at the Master's sale, and in effect setting aside the Master's sale to Tarzwell in the partition proceedings.

The facts disclosed by the record show, that James M. Myers was a farmer and heavy stock feeder and dealer in stock; and one of the customers of the Ayers National Bank of which the appellee was president; that for the purpose of conducting the business of feeding cattle and hogs, he borrowed money from the bank at different times and in different amounts; and that on or about May 17, 1919 he also borrowed the money or a part of the money from the bank to buy the house and lot which constitute the premises in controversy; and that he bought it for about $3000.00, to use and occupy as a home; and that apparently for that reason had the deed made to his wife, Rose E. Myers, and that Rose E. Myers died February 17, 1920. The mortgage sought to be foreclosed herein was thereafter made by Myers namely on April 21, 1921. Otto F. Buffe, who was connected with the Ayers National Bank, and who had personal charge of the business affairs of the bank, testifies as follows concerning what took place between him and Myers about borrowing money for the purchase of the house and lot referred to in Murrayville: "Q. At the time he bought the property in Murrayville, what conversation did you have with him about the purchase? A. Sometime prior he said he thought of buying some property in Murrayville for a home. That is the size of it. Q. What did he say about you letting him have the money for that purpose? A. Well, naturally, he expected us to take care of it for him, you know. Q. State whether you did and whether it makes a part of the indebtedness which he was owing to you? A. Yes sir; makes part of the indebtedness. He paid about $3000.00 and made improvements. Q. Now what was said by Myers to you about that time about giving you a mortgage on the property? A. Well of course the supposition was, you know, it was the understanding with us, we wanted to clear matters up and get them in shape by a mortgage someway or other **** Q. When the mortgage was made, what did Myers say to you with reference to a house and lot in Murrayville? A. He represented it was his property."

The conversation referred to by the witness occurred about the time the mortgage in question was made, namely April 27, 1921, nearly two years after the house and lot referred to had been purchased and conveyed to Myers' wife, Rose E. Myers, which conveyance was of record in the county. The title of the property had descended to the heirs of Rose E. Myers, which included her minor children. The only interest which the defendant Myers had at the time of the making of the mortgage was that which vested in him as husband of his deceased wife. While the evidence of Mr. Buffe is clearly to the effect that he expected and believed that Myers would mortgage the premises in question, it fails to show any express agreement to that effect between Myers and Buffe or the appellee; or that it was Myers intention to have the premises included in the mortgage sought to be foreclosed herein. The ground upon which equitable relief is granted to reform a written instrument is based upon the ground of mutuality. The rule is clearly stated in **Sutherland v. Sutherland** 69 Ill. 481. It is there said: "Where a party seeks to rectify a written instrument on the ground of mistake, the rule is the evidence must be such as to leave no fair and reasonable doubt upon the mind that the instrument does not embody the final intention of the parties." Kerr on Fraud and Mistake 421. 'Rectification can only be had where both parties have executed an instrument under a common mistake, and have done what neither of them intended. A mistake on one side may be ground for rescinding, but not for correcting or rectifying an agreement.' Id. 422; 1 Story's Equity Jurisprudence, Sec. 152; Fry on Specific Performance of Contracts, Sec. 505. The rule announced in the case referred to has been strictly adhered to, and has been repeatedly reaffirmed in a number of cases. See **Emery v. Mohler** 69 Ill. 221; **Wilson v. Byers** 77 Ill. 76; **Ins. Co. v. Myer** 93 Ill. 271; **Warrick v. Smith** 137 Ill. 504; **Purvines v. Harrison** 151 Ill 219; **Thompson v. Ladd** 169 Ill. 73; **Kelly v. Galbraith** 186 Ill. 593; **Stanley v. Marshall** 206 Ill. 20. And in a later case, **Bivins v. Kerr** 268 Ill. 164, which in many

respects is similar to the case under consideration on the question of mutuality the court said: "The decree cannot be sustained on the ground that there was a mutual mistake in the description of the premises in the deal. The testimony of Warren Bivins and of King is, that what Warren intended to sell, and what he offered to sell, was his interest in the land he had inherited, and that he stated this to the appellants when he went to Kerr's office and executed the deed. He had no conversation before with either of the appellants on that subject. All his communications had been through King; and though he saw and read the deed he might well fail to know what land it described. The description was all the quarter section except 1216 feet off the east side. He was a young man not known to have been familiar with the description of property in conveyance and would probably rely upon the knowledge of the appellants. That he was mistaken as to the land conveyed the evidence sufficiently shows. There was, however, no mistake on the part of the appellants. They were men of experience in real estate transactions and were acquainted with real estate titles and descriptions. Kerr was a real estate dealer. They had had the records examined and knew what appeared in them. They knew that 55 acres had been inherited from the grandfather, and 11 acres acquired later by purchase, and they necessarily knew that Warren was conveying more land than he had inherited, though he and King both testify, that he stated at the time that he was conveying one third of 55 acres **** The situation was one where the vendor had offered to sell one thing and the vendee believed he was buying another. In such case the contract cannot be reformed. The mistake is not in the expression of the agreement of the parties, for the parties minds have not met,—there has been no agreement. Warren Bivins mistakenly conveyed property which he did not intend to convey. The ap-appellants received the conveyance with full understanding, there was therefore no mutual mistake. A mistake on one side may be ground for rescinding but not for reforming a contract.

A court of equity may rescind a contract at the request of one party who has entered into it, without negligence, through a material mistake of fact, when it can do so without injustice to the other party. **Morgan v. Owens** 228 Ill. 598."

For the reasons stated, we are of opinion, that the averments of the bill of complaint upon which the right to a reformation of the mortgage in question is based are not sustained by the evidence; and that the court erred in granting this relief in connection with the foreclosure of the mortgage; and the decree is therefore reversed, and the cause remanded with directions to enter a decree of foreclosure of the property described in the mortgage.

Reversed and remanded with directions.

STATE OF ILLINOIS.

APPELLATE COURT

4TH. DISTRICT.

OCTOBER TERM, A. D. 1927.

TERM NO. 36. AG. NO. 1.

247 I.A. 648

GEORGE J. SIMON, Appellant,	:	APPEAL FROM
VS.	:	MADISON CIRCUIT
FAIRMOUNT JOCKEY CLUB, Appellee.	:	COURT.

Barry, P.J. - Appellant, in an action of assumpsit, sought to recover $11,000.00 alleged to have been lost by him in betting with appellee upon horse races. The original declaration consisted of two counts and an affidavit of claim was filed therewith. On motion of appellee the second count was stricken from the declaration and by leave of Court appellant filed an additional count to which he attached a new affidavit of claim . Appellee filed the general issue with an affidavit of merits. Appellant moved the Court to strike the affidavit of merits from the files and for a judgment by default. That motion was overruled and appellant then demurred to the general issue and the demurrer was overruled. Thereupon appellant elected to abide by his demurrer and the Court entered judgment against him for costs of suit.

SUPREME COURT OF NEW YORK.

APPELLATE COURT.

PRESENT:

HON. GEORGE PEARL, A. P. J. HOEY.

TERM NO. 80. M. Ct. App. 1.

SMITH - CAB

GEORGE L. SIMON, Appellant,	:	APPEAL. NON.
vs.	:	MADISON CIRCUIT
FAIRMOUNT JOCKEY CLUB, Respondent.	:	DENIED.

Berry, P.J. - Appellant, in an action of nonsuit, sought to recover $11,000.00 alleged to have been lost by him in betting with respondent upon horse races. The original declaration consisted of two counts and an affidavit of claim was filed therewith. On motion of appellee the second count was stricken from the declaration and by leave of Court appellant filed an additional count to which he attached a new affidavit of claim. Appellee filed the general issue with an affidavit of merits. Appellant moved the Court to strike the affidavit of merits from the files and for a judgment by default. That motion was overruled and appellant then demurred to the general issue and his demurrer was overruled. Thereupon appellant elected to abide by his demurrer and the Court entered judgment against him for costs of suit.

Appellant contends that the Court erred in striking the second count from his original declaration. When a count is stricken it is out of the case for all purposes, Slack vs. Harris, 200 Ill. 96. In the absence of a bill of exceptions, it will be presumed that the trial court properly struck the count from the files. A ruling of the Court striking a plea from the files cannot be reviewed in a court of appeal unless the pleading and the showing and the ruling are preserved in a bill of exceptions, Witteman Co., vs. Goeke, 200 App. 108. We are satisfied that the same rule applies where a count has been stricken from the declaration. In the case at bar the stricken count has not been preserved in a bill of exceptions. Appellant relies upon Whiting vs. Fuller, 22 Ill. 33, in support of his contention that a stricken count or plea remains a part of the record and need not be preserved in a bill of exceptions. That case was held to have been overruled in Gaynor vs. Hibernia Savings Bank, 166 Ill. 577. The question as to whether the Court erred in striking the second count from the declaration has not been preserved and cannot be considered.

Appellant contends that the Court erred in denying his first motion for a judgment by default. On November 30, 1926, appellee moved the Court to strike appellant's affidavit of claim from the files. When appellee filed his additional count appellant's motion to strike the affidavit of claim was extended to the affidavit filed in support of the additional count. While the said motion was pending, appellee, on December 10, 1926, moved the Court to strike appellee's said motion aforesaid and for a judgment by default because appellee had failed to comply with the ruling of the Court to plead by December 10, 1926. The abstract

Appellant contends that the Court erred in striking the second count from his original declaration. When a count is stricken it is out of the case for all purposes, Black vs. Harris, 200 Ill. 83. In the absence of a bill of exceptions it will be presumed that the trial court properly struck the count from the files. A ruling of the Court striking a plea from the files cannot be reviewed in a court of appeal unless the pleading and the striking and the ruling are preserved by a bill of exceptions, Wittmann Co. vs. Cooke, [illegible] App. 105. We are satisfied that the same rule applies where a count has been stricken from the declaration. In the case at bar the stricken count has not been preserved in a bill of exceptions. Appellant [illegible] vs. Walker, 22 Ill. 58, in support of his contention that a stricken count or plea remains a part of the record and need not be preserved in a bill of exceptions. [illegible] we held [illegible] Beach, 154 Ill. [illegible] trial [illegible] not been preserved and cannot be considered.

Appellant contends that the Court erred in denying his first motion for a judgment by default. On November 30, 1932, appellee [illegible] a demurrer or plea [illegible] the files. [illegible] the amended count appellee's motion to strike the addi[illegible] was extended to the [illegible] filed in oppo[illegible] of the additional count. While the said motion was pending appellee, on December 10, 1932, moved the Court to strike appellee's said motion aforesaid and for a judgment by default because appellee had failed to comply with the rule of the Court to plead by December 10, 1932. The [illegible]

does not show that such a rule to plead was entered. On May 23, 1927, appellee's motion to strike the affidavit of claim from the files, and appellant's motion to strike appellee's motion were both denied. The Court then granted leave to appellee to plead in ten days and its plea was filed June 2, 1927.

It is not shown that appellee was in default, but even if such were the fact the Court had ample power and authority to allow further time to plead. The time was extended and a plea filed within the time granted. Appellant has no cause to complain of the Court's action in that regard.

Appellant contends that the Court erred in overruling his motion to strike the plea and the affidavit of merits from the files and for a judgment by default. The essential averments of his declaration are that he made bets with appellee on the outcome of horse races; that by reason thereof he lost and appellee won and received from him the sum of $11,000.00. His affidavits of claim and his bill of particulars were to the same effect. The affidavit of merits filed with the plea was made by the Secretary and General Manager of appellee. It states that as such Secretary and General Manager he is appellee's duly authorized agent to represent it in this suit and that he verily believes that appellee has a good defense to this suit upon the merits to the whole of appellant's demand. That affiant further says that the nature of such defense, to the best of his judgment and belief, is as follows:-

"5. That the defendant never, at any of the times and places in plaintiff's declaration or any count thereof, or at any other time or place, made any wager or bet with the plaintiff upon any race of any kind or nature whatsoever; nor did the plaintiff ever lose

does not show that much truth to plaintiff was endorsed. On May 28, 1927, appellee's motion to strike the affidavit of claim from the files, and appellant's motion to strike appellee's motion were both sustained. The court then granted leave to appellee to plead in 30 days and the plea was filed June 2, 1927.

It is not shown that appellee was in default. But even if such were the fact the court had ample power and authority to allow further time to plead. The case was submitted and a plea filed within the time granted. Appellant has no cause to complain of the court's action in this regard.

Appellant contends that the court erred in overruling his motion to strike the plea and his affidavit of merits from the files and for a judgment by default. The essential statements of the declaration are that he made sale with appellee on the customer's terms; that by reason thereof he took and appellee's car was received from him for sale on [illegible]. The affidavits of claim and of merits filed with the plea were made by the treasurer and General Manager of appellee. It appears that the treasurer and General Manager in the appellee's city authorized agent to repossess it in case such car that he would be willing to allow appellee back a good customer. [illegible] upon the ground that the [illegible] of [illegible]. [illegible] made that the [illegible] of [illegible], to the best of his knowledge and belief, is as follows:-

"5. That the defendant never, at any of the times and places in plaintiff's declaration or any other time or at any other time or place, made any agreement or contract with the plaintiff upon any terms of sale, lease or rental or any other manner; nor did the plaintiff ever have any

to the defendant, nor did the defendant ever win from the plaintiff, any sum of money whatsoever on account of any wager or bet upon any race of any kind whatsoever."

The affidavit of merits states substantially the same thing in some of the other paragraphs thereof, but we do not deem it necessary to further quote therefrom. It seems to us that the fifth paragraph of the affidavit above quoted is an express denial of the material averments of appellant's declaration, his affidavit and bill of particulars. It clearly states that the nature of the defense is that no bet or wager was made by the parties; that no sum was lost by appellant or won by appellee by reason of any bet or wager upon any race of any kind whatsoever. Appellant insists that the affidavit is defective because it states that affiant verily believes that appellee has a good defense and that the nature of such defense, to the best of affiant's judgment and belief, is as stated therein. Section 55 of the Practice Act is to the effect that if the plaintiff files an affidavit of claim, in the form as indicated, he shall be entitled to judgment as in case of default, unless the defendant, or his agent or attorney, shall file with his plea an affidavit stating that he verily believes the defendant has a good defense to the suit upon the merits to the whole or a portion of the plaintiff's demand, and specifying the nature of such defense, and if a portion specifying the mount, (according to the best of his judgment and belief) etc. It will be observed that the statute only requires that the affidavit shall state that the affiant verily believes the defendant has a good defense to the suit upon the merits to the whole or a portion of the demand, specifying the nature of the defense to the best of his judgment and belief. The affidavit in question is entirely different from those under consideration in Cohen vs. Flaxman, 232 App. 240 and the other cases relied upon by appellant.

We are unable to discover any substantial defect in the affidavit of merits and the Court did not err in denying appellant's motion to strike the same and to enter judgment by default.

Appellant contends that the Court erred in overruling his demurrer to the general issue. That plea denies all of the material averments in the declaration and it is unnecessary to decide whether the sufficiency of the affidavit of merits can be raised by a demurrer to the plea. The affidavit of merits meets the requirements of the statute and the Court did not err in overruling the demurrer to the plea. No reversible error having been pointed out the judgment is affirmed.

AFFIRMED.

Not to be reported

STATE OF ILLINOIS.

APPELLATE COURT

4TH. DISTRICT.

OCTOBER TERM, A. D. 1927.

TERM NO. 42. AG. NO. 34.

MIKE CARTON, Appellee,	:	APPEAL FROM
VS.	:	WEST FRANKFORT
JOHN WEZALIS, Appellant.	:	CITY COURT.

Barry, P.J. - Appellee recovered a judgment before a Justice of the Peace and appellant appealed. On a trial in the City Court appellee recovered a verdict and judgment for $60.00. No complaint is made as to the admission or exclusion of evidence and no instructions were asked by either party. Counsel for appellant say:- "We do not put our contention on the ground alone that the verdict is against the weight of the evidence, now that it is not supported by a preponderance of the evidence, but we strenuously insist that it is not sustained by any evidence at all, and for that reason the judgment of the lower Court should be reversed."

Appellee testified that appellant's truck was parked on Main street and as he drove along in his car the truck was backed out from the curb five or six feet and struck and damaged appellee's car. Another witness for appellee testified that he did not see the accident, but he saw the truck was backed out from the curb five or six

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[illegible],	:	APPEAL FROM
[illegible]	:	
[illegible],	:	DIST COM'R.
[illegible].	:	

Berry, J.A. - Appellee recovered a judgment before a justice of the Peace and appellant appealed. On a trial in the [illegible] [illegible] No complaint is made as to the admission or exclusion of evidence and no instructions were asked by either party. Counsel for appellant say: "We do not rely on our contention on the ground alone that the verdict is against the weight of the evidence, nor that it is not supported by a preponderance of the evidence, but is unconscionably inadequate that it is not sustained by any evidence at all, and for that reason the judgment of the lower Court should be reversed."

Appellee testified that [illegible] [illegible] passed and he knew nothing in his way the time was backed out from the road five or six feet and struck and damaged appellee's car. Another witness for appellee testified that he did not see the accident, but he saw the truck was backed out from six feet to six

feet. A man who was engaged in repairing automobiles, testified that it would cost $61.50 to repair appellee's car. Appellant's son was on the truck and testified that it was never backed out from the curb and that as appellee's car went by the truck it struck against the end of the truck. Appellant was not present at the time of the accident.

We have carefully considered the contention of appellant and are of the opinion that there was sufficient evidence to support the verdict of the jury. It was purely a question of fact for the jury and we would not be warranted in reversing the judgment. The judgment is affirmed.

AFFIRMED.

Not to be reported

STATE OF ILLINOIS.

APPELLATE COURT

4TH. DISTRICT.

OCTOBER TERM, A.D. 1927.

TERM NO. 43. AG. NO. 13.

D. C. CRAWFORD, Appellant,	:	APPEAL FROM
VS.	:	WILLIAMSON
CORA MURRAY, et al, Appellees.	:	CIRCUIT COURT.

Barry, P.J. - On December 20, 1919, appellees executed to J. E. Carr and S. D. Lewis two judgment notes, each for the sum of $950.00, falling due in six months from date with interest at 7%. Those notes were endorsed to appellant and on June 27, 1921 he procured a judgment by confession. On motion of appellees the judgment was opened and they were given leave to plead. They filed a special plea to which appellant interposed a demurrer. The demurrer was overruled and appellant elected to stand by his demurrer to the said plea. Thereupon the court entered judgment against him for costs and in bar of the suit.

The only question involved is as to the sufficiency of the said special plea. The plea avers that the notes were not assigned to appellant before maturity or for a valuable consideration; that J. E. Carr, one of the payees, was a practicing lawyer in Johnson City, Illinois, and was also engaged in buying and selling real estate for others on commission; that appellees were the owners of 11/12 of certain farm lands in Williamson County and that

Earl Sanders, a minor, was the owner of the other undivided 1/12 interest in said lands; that prior to the time appellees inherited their interests in said lands a coal mining lease had been executed thereon by the then owners of the land, which conveyed all the coal and other minerals underlying said land with the right to mine and remove the same; that about Junel 1, 1919, appellees learned that another coal mining company was a probable purchaser of the surface and underlying coal of approximately 95 acres of the said lands; that thereupon appellees entered into an agreement with J.E. Carr; that Carr agreed to act as their agent and to sell and dispose of said 95 acres for the sum of $220.00 per acre, ~~or~~ and that when the sale was consummated he was to receive out of the purchase money all over and above $200.00 per acre, or $20.00 per acre, and that said sum was to cover all expenses in and about the sale of said land and all legal proceedings that might become necessary for the consummation of the sale. The plea further avers that the said prospective purchaser was desirous of buying the land for the sole purpose of acquiring the coal and mineral rights to the said 95 acres, and that the said J. E. Carr well knew that unless the land could be sold free and clear of the coal lease aforesaid the sale could never be consummated; that said Carr advised appellees that the lease had been forfeited by the failure of the lessee to perform some of the convenants contained in the lease, and that he (Carr) would procure by court decree a forfeiture or cancellation of said lease, and that was a part of the services to be rendered by him in the sale of the land and that such services were included in the consideration of $20.00 an acre above mentioned; that by said agreement between the said J. E. Carr and appellees it was understood that the said $20.00 per acre was to be paid to him, only out of the proceeds of sale of said lands when said sale was completed and that the amount to be so paid to him was to cover all charges of his both as lawyer and real estate broker and that he was to receive no

Ray Summers, a minor, was the owner of the other undivided 1/12 interest in said lands; that prior to the time appellees inherited their interests in said lands a coal mining lease had been executed thereon by the then owners of the land, which conveyed all the coal and other minerals underlying said land with the right to mine and remove the same; that about April 1, 1919, appellees learned that appellant coal mining company was a probable purchaser of the surface and underlying coal of approximately 85 acres of the said land; that appellees entered into an agreement with J.C. Carr; that Carr agreed to act as their agent and to sell and convey said 85 acres for the sum of $280.00 per acre, and that when the sale was consummated he was to receive out of the purchase money all over and above $200.00 per acre, or $[illegible] per acre, and that said sum was to cover all expenses of and about the sale of said land and all legal, abstracting and other expenses necessary for the consummation of the sale. The proof further shows that the said prospective purchaser was willing to buy the land for the sole purpose of acquiring the coal and mineral rights in the said 85 acres, and that the said J. C. Carr well knew that unless the land could be sold free and clear of the coal lease aforesaid the sale could never be consummated; that said Carr advised appellees that the lease had been forfeited by the failure of the lessee to perform some of the covenants contained in the lease, and that he (Carr) could procure by court action a forfeiture or cancellation of that lease, and that was a part of the services to be rendered by him in the sale of the land and that such services were included in the commission of $[illegible] an acre above mentioned; [illegible] the said J. C. Carr and appellees it was understood that the sum $[illegible] per acre was to be paid to him, only out of the purchase price of said lands when said sale was consummated; and that the amount so to be paid to him was to cover all charges of his both as lawyer and real estate broker and that he was to receive no

other compensation whatever and that he was to pay all court expenses necessarily incurred in making a sale.

The plea further avers that the said J. E. Carr afterwards advised appellees that it would be necessary to partition the land to eliminate the interests of the minor; that it was then agreed between appellees and Carr that he was to file a partition suit in connection with his bill to cancel and forfeit the coal lease aforesaid, and that all court expenses, attorneys fees and other costs were to be paid by the said Carr out of the amount to be paid him as agent for the consummation of the sale of said premises and from no other fund, and that appellees were to be in no wise personally liable to the said Carr or any one else therefor; that thereafter the said Carr filed a bill for partition and for cancellation of the coal lease in which both appellees and the said minor were made the complainants and the Big Muddy Fuel Company, the lessee, was made sole defendant; that the said defendant demurred to the bill and its demurrer was sustained and thereupon the said Carr dismissed the bill as to the defendant, thereby eliminating from said proceedings all issues involving the forfeiture and cancellation of the said coal lease aforesaid, whereby the power and the ability of the said Carr to consummate a sale of the said premises was lost and abandoned by him and appellees were rendered unable , at any time in the future, so long as the lease existed, to make a proper conveyance of the said premises; that said Carr proceeded with the said cause and procured a decree for partition of the premises and an order for the sale of the same and an allowance to him of $1900.00 as a solicitor's fee, which the court ordered to be charged and taxed as costs to be paid out of the purchase price and that the said Carr then and there concealed from the court the fact that he had agreed with appellees that no attorney fee would be charged in the said cause.

The plea further avers that thereafter the said premises were sold under an order of the court and appellees became the purchasers thereof; that prior to the said sale J. E. Carr represented to them that he had procured the cancellation of said lease and that

he concealed from them the fact that the bill of complaint had been dismissed as to the Big Muddy Fuel Company and that he concealed from them the fact that an attorney fee had been decreed as costs in the said suit; that when appellees went to the office of the Master in Chancery to settle for the purchase of the land they discovered for the first time that said Carr had procured an allowance of $1300.00 as a solicitor's fee to be taxed as costs; that they objected to the payment of the same and by reason thereof they could not procure a deed from the Master; that they told Mr. Carr that they were going to file proceedings in court to question the validity of the allowance of his solicitor's fee, whereupon he stated to them that the allowance thereof was procured solely to compel the minor to contribute his share of the expenses to be paid by the said Carr for the sale of said premises; that he would adjust the entire matter and controversy if appellees would sign the two promissory notes mentioned in the declaration and that appellees refused to do so; that Carr then represented to appellees that the notes would not be negotiated or collected except out of the proceeds of the sale of the land to a purchaser to be procured by him and that he, the said Carr and Spiller D. Lewis, a lawyer, who was associated with the said Carr in said partition proceeding, but without the consent or knowledge of appellees, would execute an instrument in writing embodying the terms of said agreement and that thereupon the said Carr and Lewis executed instruments in writing and attached the same to the said notes; that said instruments were intended to express the agreement between the parties to the effect that neither of said notes were to be collected except out of the proceeds of the sale of said land as aforesaid; that the said Carr has never procured a buyer for the said lands at any price, nor has he nor anyone for him at any time made appellees an offer of $220.00 per acre for said premises, etc.

Appellant contends that the consideration for the notes in question was the release or waiver of the solicitor's fee allowed in the partition proceedings. If the averments of the plea are true, and by the demurrer they were admitted to be true, J. E. Carr was to

pay all court costs and expenses of the partition suit and appellees were to be at no expense in that regard except in the event that Carr found a purchaser for the premises at $220.00. per acre. If he found such a purchaser who paid that amount of money for the land Carr was to have all over and above $200.00 per acre, or $20.00 per acre. That $20.00 per acre was to cover his services as attorney and broker, together with all court costs and expenses. While the plea cannot be considered as a model, yet we are of the opinion that it contains sufficient averments to present a full and complete defense to the action. Appellees are women and were clients of J.E.Carr. We are at a loss to understand why he should ask the court to tax a solicitor's fee of $1900.00 for the partition of 95 acres of land which the owners were willing and anxious to sell at $220.00 per acre. According to the averments of the plea appellees were to pay him $20.00 per acre out of the proceeds of a sale to be made by him at $220.00 per acre when the sale was consummated and the money paid. That was to cover his services both as lawyer and broker. He has never procured a purchaser.

The court did not err in overruling the demurrer to the special plea and the judgment is affirmed.

Not to be reported

AFFIRMED.

Not to be reported

STATE OF ILLINOIS.

APPELLATE COURT

4TH. DISTRICT.

OCTOBER TERM, A. D. 1927.

TERM NO. 45. AG. NO. 4.

247 I.A. 649

GODFREY - GALLEN GARAGE AND FILLING STATION, Appellant,	:	APPEAL FROM
vs.	:	ST. CLAIR
THE IMPORTERS AND EXPORTERS INSURANCE COMPANY, Appellee.	:	CIRCUIT COURT.

Barry, P. J. - On May 9, 1924 appellee issued and delivered to appellant a fire insurance policy in the sum of $1500.00. $750.00 covered appellant's stock of merchandise; $360.00 covered its stock of office furniture and fixtures, and $390.00 on its fixed and movable machinery. The property insured was totally destroyed by fire on March 1, 1925. The policy was written and countersigned by the agent of appellee at East St. Louis. The said agent was verbally notified of the loss on the day after the fire. No formal proofs of loss were furnished by appellant but on April 28, 1925 it mailed to appellee the affidavit of its president, which was, no doubt, intended as proofs of loss. That affidavit was received by appellee on April 30, 1925, the last day allowed by the terms of the policy for the furnishing of proofs of loss. Appellee returned the affidavit to appellant with a letter calling attention to the provisions of the policy as to

what the proofs of loss should contain and stating that it was not a proper or timely notice of the loss as required by the terms of the policy. The letter also stated that appellee reserved any and all objections it had both to the form and sufficiency of the paper and further stated that the policy referred to in the affidavit had been canceled and all liability terminated prior to the alleged loss.

Appellant filed a declaration in the usual form, setting out the policy in full, in which it averred that it gave appellee notice of the loss within the time specified in the policy and that it also made proof of loss as provided by the terms of said policy. An additional count was filed, in which the averments were substantially the same, except that it contained an averment that appellee's agent was verbally notified of the loss on the day after the fire. A second additional count set out the affidavit of appellant's president which was sent to appellee on April 28, 1925, and appellee's reply thereto. To the second additional count a demurrer was interposed and sustained by the Court. The parties waived a jury and the Court found the issues and rendered judgment in favor of appellee.

The policy provides that in case of fire the insured should give immediate notice of any loss thereby in writing to appellee. Appellant contends a verbal notice given to the agent who issued the policy was sufficient when no question was raised as to the form of the notice at the time it was given. It was so held by this Court in German Insurance Company vs. Gibe, 59 App. 614. That case went to the Supreme Court and while the point now under consideration was not expressly mentioned, the Court said:- "Other grounds of reversal insisted upon were also properly overruled by the Appellate Court, and we concur in the views expressed in its opinion." German Insurance Co., vs. Gibe, 162 Ill. 251.

The policy informed appellant as to what the proofs of loss should contain and required that such proofs should be furnished within 60 days after the fire. One of the requirements was that there should be a showing as to all other insurance, whether valid or not, covering any of the property; and a copy of all the descriptions and schedules in all policies; by whom and for what purpose any building therein described and the several parts thereof were occupied at the time of the fire; the cash value of each item thereof and the amount of loss thereon.

The affidavit furnished by appellant made no showing as to the cash value of each item of property destroyed and the amount of loss thereon, but simply stated that the property was totally destroyed. It stated that appellant held an insurance policy on the same property issued by the American Central Insurance Company for the sum of $2500.00 and another policy in the Home Fire and Marine Insurance Company for $2500.00; that in each of said policies the stock of merchandise was insured for $1250.00, and furniture and fixtures for $600.00 and the machinery for $600.00 . It further stated that at the time of the loss all of the property covered by the policy issued by appellee was owned by appellant and was located and contained in the building known as 412-416 South 10th street x in the city of East St. Louis; that the building in which said property was located was used for garage and filling station purposes by appellant. The affidavit stated that the total value of the property insured was more than the sum of $6500.00, which sum was the total amount of insurance upon all of the property. There was no separate estimate of the value of the stock of merchandise, the furniture and fixtures, or the machinery.

Where a policy of insurance required the insured to state, in his proofs of loss, what other insurance was on the

property, giving copies of the written portion of all policies thereon, it was held that the furnishing of such copies was a condition precedent, and if not furnished or waived no recovery could be had. Blakeley vs. Phoenix Ins. Co., 20 Wis. 217. Appellant contends that when appellee returned the affidavit and stated, among other things, that the policy had been canceled and all liability terminated prior to the alleged loss, it thereby waived proofs of loss. That letter was written after the time for the filing of proofs of loss had expired and the statement relied upon by appellant as a denial of liability and the waiver of proof was coupled with objections to the proof submitted. It is a familiar rule that if the insurance company denied all liability before the time for filing proofs has expired and before any proofs have been submitted, such denial of liability will operate as a waiver. Appellant has cited many cases of that character, but none of them would warrant us in holding that there was a waiver of proofs of loss in the case at bar.

After appellee returned the affidavit of loss and called attention to the requirements of the policy as to what proofs of loss should contain, appellant made no effort to file additional proofs. We are satisfied that the proof submitted was not in accordance with the requirements of the policy and that appellee did nothing that would operate as a waiver. It necessarily follows that the Court did not err in sustaining the demurrer to the second additional count of the declaration or in finding the issues in favor of appellee.

No reversible error having been pointed out the judgment is affirmed.

AFFIRMED.

Not to be reported

STATE OF ILLINOIS.

APPELLATE COURT.

4TH. DISTRICT.

OCTOBER TERM, A. D. 1927.

TERM NO. 59. AG. NO. 22.

247 I.A. 649

LARKIN F. BROOKS, Admr. etc., Plaintiff in Error,	:	ERROR TO
VS.	:	WILLIAMSON
MISSOURI PACIFIC RAILROAD CO., Defendant in Error.	:	CIRCUIT COURT.

Barry, P. J. - At the intersection of its railroad and a certain public highway in the outskirts of the City of Herrin, defendant built and for several years has maintained an overhead bridge over its tracks. Guards or railings were placed on either side at the outer edge of the bridge. There were spaces between the boards in the floor of the bridge. No railing or guard was erected to keep pedestrians from going upon that part of the bridge used by vehicles. The great bulk of the population of the city is to the west and south of the bridge.

Plaintiff's intestate was about four years of age. On March 30, 1921, a girl, sixteen years of age, who lived some distance west of the bridge made a visit to the Brooks' home which was about a quarter of a mile east of the bridge. When she was ready to go home, - about 5:30 in the evening,- she asked one or both of the boy's parents if the Brooks children could take her part way home, and permission was granted. Three of the Brooks children, the oldest being nine years and the

STATE OF ILLINOIS,

LETTER BOOK

GEN. DEPARTMENT.

Springfield, Ill., [illegible] 1911.

Vol. 14. No. 28.

Albert F. [illegible], M.D., adm., etc.,

[illegible]

Dear Sir:

[illegible]

Very [illegible] in the maintenance of a public library in [illegible] built and for several years was maintained as a [illegible] free library. Guards or railings were placed on either side of the outer edge of the bridge. There was open space between the posts in the floor of the bridge. In walking or guard was required to keep pedestrians from going upon that part of the bridge used by vehicles. The great bulk of the population of the city is to the east and south of the bridge.

Yesterday, [illegible] Mrs. [illegible], a girl, eighteen years of age, who lived some distance west of the [illegible] bridge, was about a quarter of a mile south of the bridge. This girl was very ready to [illegible] - about 5:30 in the evening - she asked one or both of the boys present if they knew of [illegible] of the Smoke children, the oldest being nine years and the

youngest four years of age, accompanied her. When they reached a point about the center of the bridge and were standing near the railing on the south side thereof, a train passed under the bridge and they were enveloped in a large volume of black smoke. Just about that time an automobile from the east was entering upon the bridge and the driver saw the children on the south side near the rail. He was driving along near the north side of the bridge and a moment later the smoke cleared away and upon stopping his car he found that the four year old child had been struck by his car and was lying near the rear wheel. The child had evidently crossed from the south side of the bridge to the point where it was struck, and it died a few hours after the accident.

Plaintiff averred, in his declaration, that a certain Statute was then and there in full force and effect, to-wit:- "Hereafter at all railroad crossings of highways and streets in this State the several railroad corporations in this State shall construct and maintain said crossings and the approaches thereto within their respective rights of way, so that at all times they shall be safe as to persons and property". The declaration further averred that by reason of the said Statute it then and there became and was the duty of the defendant to exercise reasonable care in making the said bridge reasonably safe for the use of pedestrians and others who had occasion to pass over it; that defendant carelessly and negligently failed to supply said bridge with guard rails to prevent pedestrians from getting on that portion of the bridge used by vehicles; that the bridge was a wooden structure and there were spaces between the boards in the floor thereof and when engines passed under the bridge great volumes of smoke would envelop the bridge and travelers thereon; that on March 30, 1921, plaintiff's intestate, then four years of age, was upon the said bridge and an engine and train of cars passed and there was a great volume of black smoke; that an automobile

approaches

was approaching from the east and came upon the bridge just as the train was passing and that the said child was struck and killed by the said automobile, because of the negligence of the defendant as aforesaid. The declaration further averred that the parents of the said child were then and there in the exercise of ordinary care for the safety of the child; that the said child left his parents, brothers and sisters surviving. The trial resulted in a verdict and judgment in favor of defendant.

Plaintiff contends that the verdict is contrary to the law and the evidence. The question as to whether defendant exercised reasonable care to keep and maintain the bridge in a reasonably safe condition for the use of pedestrians was a question of fact for the jury. The bridge was in the outskirts of the city. Its location was such that it could not be said as a matter of law that it was negligence on the part of the defendant to fail to provide a railing to separate pedestrians from that portion of the bridge used by vehicles. The jury probably found that defendant was not guilty of negligence in that regard. We would not be warranted in setting aside the verdict on that ground.

The question as to whether the parents of the boy were guilty of contributory negligence was also a question of fact for the jury. They permitted the children to leave their home at about 5:30 p.m., on the day in question, knowing that they might go upon or across the bridge before they returned. It is true that a girl sixteen years of age was with them, but nevertheless the question of contributory negligence was a question of fact for the jury.

Plaintiff insists that the court erred in refusing his three refused instructions. He requested the court to give eighteen instructions, and fifteen of them were given. The first refused instruction purports to tell the jury what was charged in the fourth additional count of the declaration. It lacks

was approaching from the north and commenced the bridge just as the train was passing and that the said child was struck and killed by the said automobile, because of the negligence of the defendant as aforesaid. [illegible] the said of the said child were then and there in the exercise of ordinary care for the safety of the child; that the said child left its parents, brothers and sisters surviving. The trial resulted in a verdict and judgment in favor of plaintiff.

Appellant contends that the verdict is contrary to the law and the evidence. The question as to whether defendant exercised reasonable care to keep and maintain the bridge in a reasonably safe condition for the use of pedestrians was a question of fact for the jury. The bridge was in the outskirts of the city. The question was such that it could not be said as a matter of law that it was negligence on the part of the defendant to fail to provide a railing to separate pedestrians from that portion of the bridge used by vehicles. The jury probably found that defendant was not guilty of negligence in that regard. We would not be warranted in setting aside the verdict on that ground.

The question as to whether the parents of the boy were guilty of contributory negligence was also a question of fact for the jury. They permitted their children to leave their home at about 8:00 p.m., on the day in question, and the fact that they might go upon or across the bridge before they returned. It is true that a girl sixteen years of age was with them, but nevertheless the question of contributory negligence was a question of fact for the jury.

Appellant insists that the court erred in refusing certain refused instructions. It requested the court to give numerous instructions, and fifteen of them were given. The fifth refused instruction purports to tell the jury that was charged in the fourth additional count of the declaration. It leaves

brevity and clarity. It covers three printed pages in the abstract. The second and third refused instructions are just as lengthy as the first one. It is seldom indeed that it is necessary to submit such lengthy instructions. The court did not err in refusing plaintiff's refused instructions.

Plaintiff contends that the court erred in giving the instructions on behalf of the defendant. He insists that by reason of the provisions of the Statute above quoted, the defendant was under an absolute duty to provide a safe bridge for the use of pedestrians and others. He averred in his declaration that by reason of the Statute it became and was the duty of defendant to exercise reasonable care in maintaining a reasonably safe bridge for the use of the public. His 10th and 12th given instructions and his second refused instruction were to the same effect. It will be seen, therefore, that he is in no position to insist that the court erred in giving similar instructions on behalf of defendant. In view of the averments of plaintiff's declaration and the instructions given at his request, it is unnecessary for us to decide the question as to whether defendant was under an absolute duty to provide a safe bridge. From a careful consideration of all of the instructions given on behalf of both parties, we are of the opinion that the jury was fully and fairly instructed and that there was no reversible error in the giving or refusing of instructions. No reversible error having been pointed out, the judgment is affirmed.

Not to be reported

AFFIRMED.

Term No. 34. Agenda No. 11.

64/96

In The

APPELLATE COURT OF ILLINOIS

Fourth District.

October Term, A. D. 1937.

247 I.A. 649

FRANK TOMZIK, By His Next Friends, William Tomzik and Sophie Tomzik, Appellant,	Appeal from the City Court of West Frankfort, Illinois.
vs.	Hon. James P. Mooneyham, Presiding Judge.
ROBERT SCULLEY, Appellee.	

Opinion by NEWHALL, J.

This is a suit brought by appellant, a minor boy about three years old, by his next friends, to recover damages, resulting, as is alleged, through the negligence of appellee.

The declaration alleged that defendant was the owner of an automobile, which he kept for business and also for the pleasure and convenience of his family; that, while it was being driven upon the public highway, the defendant negligently ran into plaintiff and injured him; and that the plaintiff at the time was exercising due care.

A plea of general issue was filed; and, after the trial before a jury, a verdict was rendered finding the appellee not guilty. Motion for a new trial was made and overruled, and judgment entered against appellant for costs. This appeal is prosecuted to reverse on the sole question that the verdict is against the law and the evidence.

The evidence on the part of the plaintiff tends to show that the appellee's automobile was being driven, at about fifteen miles per hour, east on the right side of Main Street, in Frankfort Heights, by appellee's daughter, when the car ran into appellant, who was running across the street in a southeasterly direction; that the

car stopped in a space of ten or fifteen feet after hitting the child, who was knocked to the pavement by reason of striking the front fender or wheel, and, as a result, sustained a fracture of the left arm and leg.

It is claimed by counsel for appellant that the driver had a clear view of the street, which was unobstructed, and the approaching boy, and should have avoided the accident by the exercise of due care and diligence.

The testimony on the part of appellee tends to show that the driver of the car was going about ten miles per hour; that she had complete control of the car, with one foot on the clutch and the other on the brake; that the boy darted from behind an automobile parked on the opposite side of the road; that as soon as she saw the boy she immediately put on the brakes, and endeavored to avoid striking him by turning her car to the south; that the boy ran into the side of the car near the front wheel or fender, and was thrown backward on the pavement.

In view of this state of the record, it was clearly a question of fact for the jury to determine whether or not the driver of appellee's car was guilty of negligence, and, after careful examination of the record, we cannot say that the verdict was manifestly against the weight of the evidence.

Courts are reluctant to substitute their opinion for that of the jury upon controverted questions of fact. To justify this court in reversing on the ground that evidence was insufficient, it must appear that the finding of the jury is not supported by the evidence, or that it is palpably contrary to the decided weight of the evidence. (Lyons vs. Stroud, 257 Ill. 350; Noyes vs. Hefferman, 153 Ill. 339; Parsons vs. People, 218 Ill. 391.)

The jury, who are the judges of the credibility of the witnesses, saw and heard them testify, and had the better opportunity to observe their apparent fairness and knowledge of the facts, concerning which they testified; and the trial judge gave his sanction of approval

to the verdict by overruling the motion for a new trial. (Appel vs. Alton Granite & St. Louis Traction Co., 207 Ill. App. 563.)

Being of the opinion that the verdict is supported by the law and the weight of the evidence, the judgment of the trial court is hereby affirmed.

Judgment Affirmed.

Not to be reported

Term No. 41. Agenda No. 23.

6

In The
Appellate Court of Illinois,
Fourth District.
October Term, A. D. 1927.

Released

247 I.A. 649

HOG HAVEN FARMS, Inc., Appellee,	)	Appeal from the City Court of East St. Louis.
vs.	)	Hon. William F. Borders, Presiding Judge.
INDIANA TRUCK COMPANY, Appellant.	)	

Opinion by NEWHALL, J.

Appellee recovered a judgment in the City Court of East St. Louis for the sum of $1264.00 in an action of assumpsit against appellant.

The first additional count alleged, in substance, that the parties to the cause, on May 11, 1925, entered into a contract in writing, copy of which is attached as Exhibit "A" to the declaration, whereby appellant sold to appellee a certain ten ton Indiana truck at a price of $6100.00, allowing the plaintiff $1800.00 for a used G.M.C. truck, the balance to be paid by notes of appellee in monthly instalments of $100.00 each; and that appellee was ready to carry out the provisions of the contract, but that appellant had refused to deliver the new Indiana truck, to the damage of appellee.

The second additional count alleged that appellee bargained and sold one G.M.C. truck to appellant, as described in a certain bill of sale attached as Exhibit "B" to the pleading, and that appellant promised to pay appellee what it was reasonably worth, but that appellant refused to pay.

The third additional count alleged the making of the contract and bill of sale, as set forth in Exhibits "A" and "B", the delivery of the used truck by appellee, the refusal of appellant to deliver the new Indiana truck, the retention of title to the used truck

by appellant, and the loss of profits by appellee in being deprived of the use of the old truck and damages for the value thereof.

The fourth additional count contains substantially the same allegations as the third count. The common counts were also included in the declaration. A plea of general issue was filed to the original declaration, and by order of court that plea was ordered to stand to each of the additional counts.

Appellee offered in evidence, as Exhibit "A", a written instrument consisting of a printed form of contract with blanks filled in with pencil. The instruments requests appellant to "please enter" appellee's "order for one Model 41-Dump Body & Hoist, on terms and conditions therein named." The purchase price was to be $6100.00, with an allowance to appellee on a used 1919 G.M.C. truck of $1800.00 and "balance due on delivery $4300, notes to be made $100 per month."

In the body of the printed instrument is contained the manufacturer's warranty and various provisions relating thereto, including a provision whereby the seller retained title until final payment, with conditions for default and repossession of the property by the seller in the event of nonpayment of the payments required to be made by the terms thereof.

At the foot of the instrument the following provision appears:- "There are no written or verbal understandings or agreements outside of this written contract and none authorized to be made on behalf of either party hereto. <u>This proposal constitutes a contract only when accepted and approved by the seller by endorsements hereon.</u>

"Acceptance--The foregoing is hereby accepted at the price and upon the terms and conditions named herein.

"Purchaser: Hog Haven Farms, by S. P. Elliott.

"Date 6-11-26 Salesman W.A.Whiteside.

"INDIANA TRUCK COMPANY

"_____

Manager."

Upon the reverse side of the foregoing document, which consisted of a single printed blank form of contract, was a printed form of Bill of Sale, offered in evidence as Exhibit "B", signed by appellee, which recited that appellee owned the used truck in controversy, and that appellee would deliver the same to appellant at the time of delivery of the new Indiana truck; that appellee transferred the title to the used truck in consideration of being allowed a credit of $1800.00, as specified in the contract, and the Bill of Sale was to be considered as part of the contract appearing on the opposite side of the instrument.

S. D. Elliott, the president of appellee, testified that Whiteside, salesman for appellant, called on him three or four times prior to May 10, 1926, with reference to the purchase of a truck; that on May 10, 1926, Whiteside and Warner, the branch manager of appellant's business at St. Louis, talked to him in a general way about purchasing a new truck, and taking in trade, as part payment, a used truck owned by appellee; that he, Elliott, told them that, if they would do what he specified and make the payments to suit him, he would trade in the used truck at a price of $1800.00; that they agreed that Elliott and Whiteside would go to Belleville to examine one of appellant's trucks, which they did the next day; that, after such examination, Whiteside and Elliott came back to appellee's house, where Elliott signed the instrument in question with the signature of "Hog Haven Farms, by S. P. Elliott" opposite the printed word "purchaser", and Whiteside at the same time wrote his name "W. A. Whiteside" after the printed word "salesman." Elliott, on the same occasion, signed the bill of sale, which was offered in evidence as Exhibit "B".

On May 12,1926, Elliott removed the body house from the used truck, and, on May 13, 1926, Warner and Whiteside told him that they were not going through with the trade. They asked him to pay $150.00 per month instead of $100.00 per month, which amount was written in the proposal. Elliott testified that he refused to make the change, but that he did offer to compromise by making the monthly payments $125.00 per month, and later withdrew that offer, insisting,

as he says, that he understood that the papers signed constituted a contract binding on appellant; that he requested Whiteside and Warner to remove the used truck from his premises, and demanded the delivery of the new Indiana truck; that Elliott received a letter dated May 12, 1926, from appellant, two or three days after May 12, 1926, which was, in substance, as follows:

"Dear Mr. Elliott:

We received yesterday evening a proposal which you gave to Mr. Whiteside covering the purchase of a 5-ton Indiana truck, wherein you proposed to trade your old G.M.C. Chassis without the body, and was to pay $100.00 per month.

"I cannot imagine why Mr. Whiteside would feel that there was any possibility of getting an order like this through our credit department, as the time of payment is stretched out over entirely too long a time. Knowing the difficulty of getting a deal of this kind through, I immediately called the Vice-President of our company, but was unable to reach him until about 12:30 this morning, and I gave him the details of the proposed offer, but was unable to get him to accept it. xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

"We are returning to you the proposal which you signed, carrying on the back of it the Bill of Sale of your old G.M.C.

Yours very truly,

Indiana Truck Company,
J.O.Warner,
Branch Manager."

Appellee offered evidence as to the use value of the new truck in its business, and of the market value thereof.

On behalf of appellant, Whiteside testified that he was a salesman for appellant; that he had solicited appellee to purchase a truck; that Elliott told him he wished to pay only $100.00 per month on the purchase price, and that he advised him that the deal was on longer terms than the company was giving, but that he felt sure that it would go through; that he signed the written proposal as salesman; that he took the document to Warner, and that they both called on Elliott the next day after the signing thereof to tell him they could not put the deal through with the truck company, because it would not accept the terms of the proposal; that his authority as salesman was to take orders and to sell, but that he had no further authority to transact business for appellant.

J. L. Warner testified on behalf of appellant that hewas the manager in charge of appellant's business at St. Louis; that Whiteside was a salesman for appellant and brought the proposal in question to him; that he told Elliott that delivery could not be made because the payments extended over a three-year period, and that he would not approve the deal as specified in the proposal; that he had the right to accept or decline any proposals that were brought to him by salesmen; that Whiteside's job was to go out and solicit orders and to sell trucks; that he had told Whiteside not to sign Ellicott up on the proposition he had made; that he had heard Elliott make a proposition to pay $100.00 per month, but that he was not in a position to accept it.

After trial before a jury, a verdict of $1264.00 was rendered against appellant. Motion for a new trial was overruled, and judgment was entered on the verdict.

Error is assigned in the admission of incompetent testimony in refusing to peremptorily instruct the jury to find a verdict for appellant at the close of appellee's testimony, and again,at the close of all the evidence, in refusing to grant a new trial, and in refusing appellant's instructions.

The first point argued by appellant is that the court erred in refusing to grant appellant's peremptory instructions directing a verdict, and in refusing to give appellant's instruction No. 6, the latter being to the effect that the paper introduced in evidence on the part of appellee purporting to be a contract was in no way binding on appellant, and should be disregarded by the jury.

In reply to this contention, it is urged by appellee that,as appellant pleaded only the general issue, the question of the execution of the contract was not put in issue.

The record discloses that appellee sought to prove by oral evidence the execution and the apparent authority for execution of the instrument in question, which was controverted by oral evidence admitted without appellee raising the question that such evidence was inadmissible for want of verified plea.

The court in its rulings on the evidence stated that "the only question in the case was whether or not there was a complete legal agreement entered into in writing"; that certain oral evidence was admissible on the question of whether there was an agency created by estoppel, and the court instructed, without objection from appellee, upon the question of whether or not there was in fact a contract executed between the parties.

Where the parties have voluntarily tried the case as if certain matters were in issue, neither will be permitted afterwards to object that such matters were not properly put in issue by the pleadings. (31 Cyc 733.)

Where the record discloses that the case was tried by both parties under the impreseion that a verified plea or affidavit denying execution was not necessary to render the the testimony of the defendant incompetent, the plaintiff should not afterwards be permitted to change his position.

Specific objection should have been made when the proof was offered, and it comes too late,when first raised in the Appellate Court,to be availed of. (Logan vs. Mutual Life Insurance Co., 293 Ill. 510.)

The record thus presents for consideration and determination the question of whether or not there was a contract in writing binding upon appellant.

Appellant contends that the signature of Whiteside, as salesman, and his acts did not amount to an execution of the contract by appellant,as seller, nor an acceptance and approval thereof by appellant.

The contract expressly provided, as follows:- "This proposal constitutes a contract only when accepted and approved by the seller by endorsements thereon."

The evidence shows that appellant did not authorize Whiteside, its salesman, to accept and approve the contract on its behalf, and, by the letter introduced by appellee, it was shown that

Warner, the branch manager for appellant, expressly refused to approve or accept the contract, and returned the same unaccepted to appellee, because the time of payment was extended over too long a period. Whiteside's name, written on the contract after the printed word "salesman", was not and did not purport to be the endorsement contemplated by the plain wording of the contract to be written thereon by one duly authorized by the seller.

The contract may itself stipulate certain requirements to be observed in its execution, and contractual provision may go farther than to the fact of formal execution and control the actual acceptance of the contract. (14a Corpus Juris, 590.)

A mere propoal by one person to make a contract constitutes no bargain of itself, and the proposal must be unconditionally accepted by the person to whom it is made in order to make a contract. (Slaymaker vs. Olmstead, 197 Ill.App.496; The Estate Stove Co. vs.Kenney, 234 Ill.App. 386; Bent vs. Jones, 172 Ill. App. 62; E. C. Atkins & Co. vs. Kirk, 187 Ill. App. 311; Bixler vs.Henson, 197 Ill. App. 101.)

Appellee contends that the contract is binding upon appellant because Whiteside's acts were within the apparent scope of his authority as salesman and agent, so as to bind the seller, and this was sought to be proved by the declarations made by Whiteside to Elliott, as testified to by Elliott in connection with Warner's acts in endeavoring to get the officers of appellant to approve the contract. It is further argued that, because Warner had the power to accept or reject proposals brought to him by salesmen, and because Elliott had told Warner and Whiteside not to return unless his terms of payment were satisfactory to the seller, this conduct was such as would constitute a waiver of the express conditions of the contract as to written endorsements by the seller, and that appellant is now estopped to claim that it is not bound by the contract.

Persons dealing with an assumed agent are bound, at their peril, to ascertain not only the fact of agency, but the extent of the agent's authority. They are put upon their guard by the very fact that they are dealing with an agent, and must, at their peril, see

to it that the act done by him is within his power. It is their right and duty to ascertain the extent of his power, and to determine whether his act comes within the power granted, and is such as binds his principal. An agent cannot confer power on himself, and, therefore, his agency or authority cannot be established by showing what he said or did. The source of authority is the principal, and the power of the agent can only be proved by tracing it to that source in some word or act of the alleged principal. (Merchants National Bank vs. Nichols & Co., 223 Ill. 41 (49) and cases cited therein.)

A party dealing with a special agent or an agent having only special authority to act for his principal must acquaint himself with the extent of the agent's authority. (Murray vs. Standard Pecan Co., 309 Ill. 226.)

Appellant's salesman, Whiteside, had no express authority to accept or approve the contract which he solicited. His duty was to sell and solicit contracts, which were subject to rejection or approval by appellant acting through its manager or other authorized officers.

As a general rule, a sale must be for cash only, and, in the absence of special authority, mere authority to sell does not give the agent authority to sell on credit. (2 Corpus Juris 599.)

It is clear that, in view of the facts and the authorities quoted, Whiteside did not have either the express or implied authority to execute the contract in question on behalf of appellant, and that Warner's action in refusing to accept the proposal and returning the same to appellee, in legal effect, absolved appellant from any liability thereunder.

As to the alleged claim of waiver and estoppel urged by appellee, we are of the opinion that appellee did not make such proof as would bring it within the protection of that doctrine. (See 2 Corpus Juris 464-5.)

Appellee relied upon the declarations of a supposed agent with limited authority, which was expressly provided against in the very document which he signed. Common prudence and inquiry by appellee would have led to a quick discovery of the agent's lack of

authority to enter into either the written or verbal contract, which appellee seeks to establish in this case against appellant.

Appellee could not maintain an action under the common counts in view of the undisputed facts in the record, and it has been repeatedly held that in a suit to recover damages for the non-delivery of goods under an executory contract to sell, or for the non-delivery of goods bargained and sold, no recovery can be had upon the common counts. (Seckel vs. Scott, 68 Ill. 106; Brand vs. Henderson, 107 Ill. 141.)

We are of the opinion that the trial court erred in refusing to give appellant's peremptory instructions, and in denying its motion for a new trial.

For the reasons above stated, the judgment of the court below is reversed, and the cause remanded for new trial.

Judgment reversed and cause remanded.

Not to be reported

Term No. 61. Agenda No. 20.

In The

APPELLATE COURT OF ILLINOIS,

Fourth District.

October Term, A. D. 1927.

247 I.A. 649

The People of the State of ILLinois, Appellee, vs. Al Kruger, alias Al Bodman, Appellant.	Appeal from the County Court of Madison County. Hon, Wilbur A. Trares, Presiding Judge.

Opinion by NEWHALL, J.

This is an appeal from the County Court of Madison County to reverse a judgment rendered against appellant on a charge of bastardy.

The relatrix testified that appellant had sexual relations with her during the first week in July, 1924, and twice afterwards at intervals of about a week. She had been in the company of appellant on a former occasion in the month of June.

She also testified that she had never had intercourse with any other man; that she met appellant about three months after she became pregnant, informed him of her condition, and asked him what he was going to do about it.

The child was born April 11, 1925, and shortly thereafter appellant left the State of Illinois, and did not return until May, 1926, when he was arrested on the charge of bastardy.

Appellant testified that he first met the relatrix in April or May, 1924; that he and a friend went riding with the relatrix and her sister; that a week later he again went riding with the relatrix and on this occasion he first had sexual intercourse with her; that two nights later he again met relatrix, and again had intercourse with her, fixing the time definitely in the month of May; and claims that was the last occasion he ever was in the company of the

relatrix; that he left the State of Illinois when he learned that a warrant had been issued for his arrest, and remained out of the state a year.

The sister of the relatrix testified in corroboration of her version to the effect that she was present with relatrix, appellant, and another man during the forepart of July, 1924, on a night trip to a resort near Granite City, where the relatrix and appellant left the car in which the parties were riding; that they were absent about half an hour, and upon her return to the car with appellant she appeared to be angry, and demanded that the boys take her home; that later she noticed blood stains on her sister's clothes.

Counsel for appellant contend that the verdict of the jury is not supported by the evidence, and that the trial court erred in sustaining objections to certain questions propounded by appellant's counsel.

In a prosecution for bastardy, where the evidence is conflicting, the question whether the defendant is the father of the child is a question for the determination of the jury. (Handley vs. People, 196 Ill. App. 556; People vs. Coleman, 200 Ill. App. 610.)

It is immaterial in bastardy proceedings on what particular days alleged acts of intercourse took place, if, in fact, the defendant is the father of the bastard child. (People vs. Coleman, supra.)

Counsel contend that the story of relatrix as to her relations with appellant was improbable and not corroborated; that her version of repeated forced relations was highly improbable; but, in view of the fact that the relatrix was evidently not fully familiar with the English language, it may be that she did not intend the use of certain words in the sense that counsel now claim.

That the defendant had sustained sexual relations with the relatrix on recent occasions was admitted, and it was peculiarly within the province of the jury to determine who was telling

the truth, and whether or not the relatrix was corroborated by her sister's testimony.

We are of the opinion that the verdict is sustained by the greater weight of the evidence.

It is urged that the trial court erred in sustaining objections to two questions propounded by appellant's counsel, but we are of the opinion that these questions were incompetent, and did not tend to elicit any fact which was material to the issues in the case.

For the reasons above stated, the judgment of the trial court is affirmed.

Affirmed.

Not to be reported

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT.
OCTOBER TERM A. D., 1927.

247 I.A. 650

HENRY WARDEIN AND HENRY J. WARDEIN, Jr., Plaintiff in Error. vs. EUPHRASIA D. QUINTAL, Defendant in Error.	Writ of Error to The City Court of The City of Alton, Madison County, Illinois.

Justice Wolfe rendered the opinion of the Court.

This appeal seeks to reverse a judgment of the City Court of Alton, Illinois, for the appellee, predicated upon a verdict in her favor, by a jury for the sum of Five Hundred Dollars and costs in an action of trespass on the case, for having caused injuries to the appellee, by running into her automobile on a public street in the City of Alton with another automobile, or auto-truck, driven by Henry Wardein, Jr.

The declaration charges that the appellant, Henry Wardein, the defendant in question, was possessed of and was using and operating a certain auto-truck by his servant, the appellant Henry J. Wardein, Jr., upon and along Liberty street in a southerly direction near the intersection of Liberty and Union streets in the City of Alton. That it was the duty of the appellant to use and exercise reasonable care and caution in so doing so as to avoid injuring persons upon said street. That said Henry Wardein, by and through his servant, Henry J. Wardein, Jr., not regarding his duty in that behalf, so carelessly and inproperly drove and managed his auto-truck that it ran and struck with great force and violence upon and against the automobile then being operated by the appellee in a westerly direction upon and along Union street and the intersection of Union and Liberty streets, whereby the appellee was violently thrown across the street and she sustained the injuries complained of. The declaration alleges that the appellee had been in

the exercise of due care and caution for her own safety and security while she was operating her automobile.

The appellant, Henry Wardein, filed a plea of the general issue, and a special plea denying possession and control of the automobile alleged to have been driven by the appellant Henry J. Wardein, Jr., and also denied the agency of said Henry J. Wardein, Jr., so far as the appellant Henry Wardein was concerned. The appellant, Henry J. Wardein, Jr., filed a plea of the general issue.

The facts in the case so far as are pertinent for the discussion of the same are: Liberty street in the City of Alton in the vicinity of the collision in question extends in a general northerly and southerly direction, and north of the intersection with Union street has a grade northerly for some distance. Union street where it crosses Liberty street, runs in a general easterly and westerly direction.

The appellee at the time in question was driving a Ford coupe from her home in the City of Alton to the plant of Noll Baking Company where she was employed, and in so doing drove her coupe westerly on Union street toward the intersection of Liberty street; at the intersection the car or truck of the defendant was coming in a southerly direction on Liberty street towards the said intersection, and was driven by Henry J. Wardein, Jr. The car, or truck in question was owned by Henry Wardein, who is the father of Henry J. Wardein, Jr. In the truck with Henry J. Wardein, Jr. was his mother and younger brother. Henry J. Wardein, Jr. was driving the truck taking his mother and brother to church. The cars collided at the intersection of Union and Liberty streets and both cars being damaged; each party claims they were driving with due care and caution, and that the other party was to blame for the collision.

The case was submitted to a jury for their consideration and they have found in favor of the appellee. The facts are very much in dispute, and if the case has been properly submitted to the jury for their consideration we would not be justified in disturbing the verdict, as the jurors hear the witnesses testify and have a better chance to weigh the evidence than this court has by reading the evidence and not seeing the witnesses, and their verdict should be final in regard to the facts.

It is contended first: That the court erred in not directing the jury to find the defendant, Henry Wardein, not guilty, as the plaintiff had failed to make out a case against him. The evidence clearly shows that the son, Henry J. Wardein, Jr., was driving the car or truck taking his mother and younger brother to church, and that this was done with the consent of the father, Henry Wardein. The evidence further shows that this was not an unusual occurrence; that the son used the truck and took members of the family around in it whenever they wanted to go. He knew that it had been done and he never objected to it. "When the truck, or machine, was there for them to use, if he had no use for it, they would use it; sometimes they would ask for it; other times they would use it and he would find it out afterwards."

From the testimony in the case we find that the father had knowledge of the use of the car and the son would be acting as his agent in driving the car taking his mother to church. Gates vs. Mader, 316 Ill. page 313--"An owner of an automobile who keeps a car for the convenience of his family and allows his son to drive it is liable for an injury to pedestrians caused by the negligence of the son when driving the car to take his mother and her friends on a social errand even though the son was of age and did not live at home." Huckle vs. Gall, 238 App. page 516.

The holding of the court in this case properly disposes of appellant's assignment of error that the court erred in not finding Henry Wardein not guilty under the declaration and proof as requested.

The court held that Henry Wardein, Sr., was a proper party defendant, and refused to instruct the jury to find him not guilty. The court properly held that Mrs. Wardein, the wife of Henry Wardein, was not a competent witness in his behalf and excluded her evidence.

Criticism is made of plaintiff's instruction No. 1, the main criticism being: That the instruction omits one principal element, viz: That the plaintiff must be in the exercise of due care and caution on her part at the time of the accident; also that the instruction gave an abstract proposition of law which was erroneous. It will be observed that the instruction does not direct a verdict, but as the appellant says, 'a pure abstract proposition of law". The appellant cites the case of the C. B. & Q. RR. Co., vs Harwood, 80 Ill., page 88, that such an omission would be fatally erroneous to the instruction, but, an examination of that case will show that the instruction in question in the Harwood case directed a verdict. If the proposition of law is stated in other instructions, and they quote the law properly that has been omitted from the erroneous instructions, the error would be cured.

"It is not required that the entire law of a case shall be stated in a single instruction, and it is, therefore, not improper to state the law as applicable to particular questions, or particular parts of a case in separate instructions, and if there is no conflict in the law as stated in the different instructions and the instructions considered as a series present the law applicable to the case fully and correctly it is sufficient."--C & E I RR, vs. Hines, 132 Ill. 161-169.

The holding of the court in this case presents the power of appellate review of a case that the court stated in its finding to be "which has merit in justification and which is regrettable."

The court took that honor verdict, Mr. Jus[illegible] per curiam defendant, and ordered to instruct the jury to find him not guilty. The court proceeded into the, Napier, the wife of Henry Sheldon, was not a competent witness in his behalf and excluded her evidence.

Destation is more of defendant's instruction No. 1, the main criticism being: that the instruction omits one principal element, viz: that the defendant must be in the exercise of due care and caution on his part at the time of the accident; also that the instruction goes on advanced proposition of law which was prejudicial. It will be observed that the instruction does not direct a verdict, but is the opponent says, "a pure abstract proposition of law."

The opinion gives the case of Mo. C. R. R. Co. vs. [illegible], 90 Ill., page 87, that such an objection merely errorneous to the instruction, but, on examination of that case will show that the instruction in question in the instant case directed a verdict. If the proposition of law is stated in other instructions, and they state the law properly that was been omitted from the erroneous instruction, the error would be cured.

"It is not required that the entire law in a case shall be needed in a single instruction, nor is it necessary, nor proper to give the jury as applicable to particular questions, or pleadings parts of a case in separate instructions, and if there is no conflict in the law as stated in different instructions and the instructions taken together, a series present the complete law, [illegible] can easily be in sufficient."— [illegible] vs. [illegible] 1[illegible] Ill. [illegible].

In the Bielder vs. King, 209 Ill. 315, a case very similar to the case at bar, the court says in the following language: "The first instruction is objected to upon the ground that it does not require the exercise of ordinary care by the plaintiff. That is true if the instruction is considered by itself; but, all the instructions, both those given for the plaintiff and those given for the defendant must be considered as one charge. Upon examination of the instruction given for the defendant, we find that five of them ("The same is true of the case at bar") definitely and in express terms say to the jury that the plaintiff cannot recover unless he shows that at the time of the injury he was in the exercise of ordinary care for his own safety. The plaintiff's instruction, although unnecessarily announcing the now obsolete doctrine of comparative negligence is not inconsistent with the five instructions of the defendant which require the exercise of ordinary care as a condition to the right of recovery and when it is read in connection with such instructions it could not have misled the jury."

"Instructions stating mere abstract principles are only objectionable when their tendency is to mislead the jury." Peo. vs. Fuller, 238 Ill. 135; Bellamy vs. Hobbett 142 Ill, 72; C. & A. Ry. Co. vs. City of Pontiac, 169 Ill. 155.

The instructions properly state the law and any omission of negligence has been cured in the other instructions given by the Court.

The appellant, Henry Wardeins, Sr., was denied the privilege of introducing evidence that he owned and maintained a Cadillac automobile for the use of his family for family purposes. We cannot see how this evidence would have any bearing on what the son and wife were doing with the truck, or automobile in question. The Court properly sustained the objection to the offer of making this proof.

In the Holden v. Hardy, 169 U.S. 366, a case very similar to the case at bar, the court says in Mr. Justice Brewer's opinion: "The labor legislation is objected to only by ground that it does not secure the operatives of employers against the physicians. Such is true if the legislation is considered by itself alone, but the legislation, with those relating to the physician, must be taken together and be considered as one system. Such consideration of the legislation gives the reason for the distinction, and shows that it is not arbitrary, but rooted in the conditions of the business. The plaintiff's business is not one which is free of the risks of life and limb (the same is true of the case at bar) definitely and in separate form as the business of a physician, and in separate form as the business of a physician. Plaintiff cannot recover upon the ground that the exercise of the police power in the exercise of ordinary care for his own safety. The plaintiff's business, without unnecessarily endangering the non-hazardous business of a corporative nature, is not inconsistent with the direct enforcement of the Sherman "Anti-Trust" and related of ordinary care as a condition to the right of recovery and when it is used in connection with such business it could not have existed. So long."

Twenty-three years later, a similar, unconstitutional, only slightly distinguishable state trust statutory it to relate was, in Ex. Ex. Frisbie, 243 U.S. 325 (1917) — [illegible] v. [illegible] 3d. do. Va. Fire ed Marine, 169 U.S. 366.

The [illegible] property under the [illegible] exercise of legislative [illegible] it is, under a reasonable [illegible] of the [illegible].

The appellant, Lucas Frisbie, Esq., was arrested for violation of Louisiana Statutes and in order to obtain a judicial determination and protection of his rights in the Federal Courts, he cannot be forced to violate the Federal Anti-Trust Act. He cannot be forced to violate the Federal Anti-Trust Act, or suffer the penalties and forfeitures and be subjected to the [illegible] or suffer the penalties in question. The issue is simply whether the [illegible] obligation to the [illegible] of [illegible] [illegible].

We find no error in the admission or [illegible] of evidence of the trial court, [illegible] in the instructions given.

The judgment of the Circuit Court will be affirmed.

Not to be reported

IN THE

APPELLATE COURT OF ILLINOIS 247 I.A. 650

FOURTH DISTRICT.

OCTOBER TERM, A. D. 1927.

JAMES F. MOORE, Appellee, vs. EAST ST. LOUIS AND SUBURBAN RAILWAY COMPANY, Appellant.	Appeal from the City Court of East St. Louis, Illinois.

Mr. Justice Wolfe rendered the opinion of the Court.

The Appellee sued to recover for damages sustained by reason of a collision between the Appellant's interurban car and appellee's automobile, alleging that the appellee was damaged to the amount of $5000.00.

The declaration originally consisted of six counts, but at the conclusion of the appellant's evidence he voluntarily dismissed all but the third and fourth counts of his declaration.

The third count of the declaration avers that the defendant was the owner of a certain electric car, etc.; that the plaintiff was possessed of a Ford coupe; that while driving said Ford coupe upon a public street known as the "St. Louis Road" in the corporate limits of the Village of Fairmont City on the 2nd day of February, A.D. 1926, and while in the exercise of due care for his safety and the safety of his automobile, and while he was crossing the railroad tracks of the defendant on said public street or highway within the corporate limits of said Village of Fairmont City, the defendant, by its said servants, was negligently and carelessly driving and managing its said car westerly and upon said line of railroad or railroad tracks thereof; that said car ran upon and against the Ford coupe of the plaintiff with great force and violence and threw the plaintiff out of his automobile

[illegible] Court of [illegible]

[illegible]

[illegible], A. D. 1907.

[illegible]	[illegible]	Appeal from the City [illegible]

[illegible] delivered the opinion of the Court.

The Appellee sued to recover for damages resulting from the wrongful [illegible] and appellee's [illegible] [illegible] in the amount of $8000.00.

The declaration originally consisted of six counts, but at the commencement of the trial [illegible] dismissed all of the third and fourth counts of the declaration.

The third count of the declaration [illegible] that the defendant was the owner of a certain electric car, and that the liability was [illegible] by a [illegible] and that after [illegible] the negligence of the defendant on that [illegible] the negligence of the defendant in the operation of said car, [illegible] the defendant, by its said servants, was negligently and carelessly driving and managing the said car [illegible] said line of railroad or without [illegible] and [illegible] lamps and lights and ringing the [illegible]

upon the roadway thereof by means of which the plaintiff sustained injuries, etc."

The Fourth count of the declaration charges that while the plaintiff was driving along said road, and while he was crossing the rails and tracks of said defendant on said public street or highway, the defendant, by its servants willfully and wantonly and with a total disregard of the safety of the plaintiff's person drove defendant's car upon and against the Ford coupe of the plaintiff, etc., and injuring the plaintiff".

The defendant filed a plea of 'not guilty'.

The Appellee recovered a judgment for $5000.00 and costs of suit.

The Ford coupe in which the appellee was riding was either thrown onto the track of the appellant or driven onto it just as the limited car of the appellant was passing, with the result that the Ford coupe was struck by the appellant's car and the appellee and his car were injured. The place where the appellee attempted to cross the tracks of the appellant is not at a regular crossing, but is about midway between Bridge Avenue and Vandalia Avenue.

The Appellant in its assignment of errors sets forth numerous causes why it claims the judgment should be reversed.

In the seventh assignment the ground for error is in the Court not granting defendant's peremptory instruction offered at the close of all the evidence to find the defendant not guilty as to the Fourth count of plaintiff's declaration.

We have examined this record carefully and find no evidence that tends to support the Fourth count of the declaration, viz: "That the defendant, by its servants, wilfully and wantonly and with a total disregard for the safety of the plaintiff's person or the safety of his property, drove the car, etc.", that caused the

damage in question. There being no evidence to sustain the charge in this count it was error to refuse the instruction as offered concerning the Fourth count of the declaration.

There is no showing that at the time of the accident in question that the appellee was crossing the rails and tracks of the said defendant on said public street or highway, but the evidence clearly shows the place where he attempted to cross the tracks of the defendant was on the right-of-way of the defendant and between two public crossings.

As the plaintiff was driving on the hard road he overtook and passed a coal truck driving in a westerly direction. As he passed the truck he had an unobstructed view ahead for at least a quarter of a mile, and by looking backward he would have the same unobstructed view for a distance of between a quarter and a half a mile. As he attempted to pass this truck he was immediately confronted with the danger of having a collision with a truck approaching from the west, and according to his testimony he looked east and saw nothing approaching. He drove his car upon the tracks and before he could cross he was struck by the car of the defendant.

In the 245 Appellate, at page 158, we use the following language: "If a person looks he is supposed to look for the purpose of seeing, and if the object is in plain sight and he apparently looks but does not see it, it is manifest he does not do what he appears to do. The law will not tolerate the absurdity of allowing a person to testify that he looked and did not see the train when the view was unobstructed and where, if he had properly exercised his sight he must have seen it. Such is the language of the courts in variant form in the following cases: Chicago, P. & St. L. Ry. Co. v. DeFreitas, 109 Ill. App. 104-106; Chicago & A.R. Co. v. Vremeister, 112 Ill. App. 346-351; Chicago, R.I. & P. Ry. Co. v. Jones, 135 Ill. App. 380-384; Toledo, St. L. & W.R. Co. v. Gallagher, 109 Ill. App.

67; Kennedy v. Alton, G.& St. L. Traction Co. 180 Ill. App. 146-149. There may be such inherent improbability in the testimony of a witness as to authorize a court or jury to disregard it, even though there is no contradictory evidence by other witnesses." We are of the opinion that the appellee by his contributory negligence caused this accident.

Each of the counts in the declaration charge: "That while the plaintiff was crossing the railroad tracks of the defendant on a public street or highway within the corporate limits of the said Village of Fairmont City the defendant, by its servants, etc., caused the damage." There is no evidence to sustain this allegation, in either count of the declaration, that the plaintiff was crossing the railroad tracks of the defendant on a public street or highway.

The language appellee used in alleging where this accident occurred would lead one to believe that there was a crossing of some kind over the defendant's tracks, but the evidence is uncontradicted that the accident happened between the crossings and on the private property of the defendant. This, we think, is a variance in the allegations in the declaration and the proof. The motion of the defendant for a directed verdict at the close of all the evidence should have been sustained.

Objection is made to the closing argument of counsel for the plaintiff; especially is it objected that Mr. Farthing in his argument said "It is no wonder that the motorman is no longer working for the Street Car Company." This was improper, but no doubt counsel in the heat of argument did it unthoughtedly. It would not of itself, in our opinion, be enough to reverse the judgment.

The main defense relied upon by the appellant is the contributory negligence of the plaintiff. We are of the opinion that the plaintiff through his contributory negligence caused the accident, and for this and other reasons as above set forth the judgment is reversed and the cause remanded.

Not to be reported

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT.

October Term, A.D., 1927.

PLATO McCOURTNEY, Plaintiff in Error, vs. Levi Billington, Sarah Billington, Ed. F. Peel, and Mary Peel, Defendants in Error.	Error to Circuit Court of Pope County.

Mr. Justice Wolfe rendered the opinion of the Court.

On the 7th day of July, 1916, Levi Billington, Sarah Billington, Ed. F. Peel and Mary Peel, borrowed from the Pope County State Bank $2000.00. They executed their promissory note to said bank for said sum, payable one year after date, and to secure said note they executed their mortgage which is the mortgage in question, and delivered same to the Pope County State Bank on the day of the date of said note.

On the 12th day of October, 1917, the Pope County State Bank assigned said note and mortgage to Robbie M. Smith, of which the defendants in error had knowledge. On the 3rd day of December 1917, Robbie M. Smith assigned, without the knowledge of the defendants in error, said note and mortgage to Plato McCourtney, plaintiff herein. The defendants in error did not receive notice of the assignment of said note and mortgage until the 11th day of April, 1924. The makers of said note and mortgage paid the whole amount due thereon to Robbie M. Smith on the 11th day of October, 1921.

On December 3, 1917, Robbie M. Smith, now Robbie M. Robs, borrowed from Plato McCourtney, Plaintiff in error, the sum of $1800.00, giving therefor a promisory note dated December 3, 1917,

AMERICAN WOOD CO. LIMITED.

FIRST MORTGAGE.

Report Issue S.E., 1917.

Bondholders as at 1st July, 1917. Nil. Dent Gillingham, Esqre. Gillingham, Mr. F. Fred, and Dent Fred, Merchants in Essex.	Issued to Bondholders Court of Chancery.

30. During this Year ended the 31st day of the month.

On the 7th day of July, 1917, Dent Gillingham, Esqre. Gillingham, Mr. F. Fred and Dent Fred, retired from the Company which was Dissolved. They received their Debenture Bonds in full from the Company for their own, joints and other debts, and to secure such debts they assented that Debenture which is the mortgage in question, was delivered back to the Trustee Company Ltd. on the day of the date of such debts.

On the 12th day of October, 1917, the Trustee Company Ltd. assigned such mortgage to Robbie E. Smith, of which the Defendants in error had knowledge. On the 3rd day of December 1917, Robbie E. Smith assigned, without the knowledge of the defendants in error, said note and mortgage to Chase Manhattan, specially corporation. The defendants in error did not receive notice of the assignment to said corporation until the 11th day of April, 1918. The notice of said note and mortgage was made known the Defendant to Robbie E. Smith on the 14th day of October, 1921.

On December 4, 1917, Robbie E. Smith, Jr. Robbie E. Smith, assigned from Chase Manhattan. Plaintiff in error, the owner of Bond "C", notice therefore - Defendant error filed Demurrer. "C", "C",

due in five years after date, bearing interest, etc. To secure the payment of this note she assigned to Plato McCourtney the promissory note of the defendants in error to the Pope County State Bank. Neither the assignment from the Pope County State Bank to Robbie M. Smith, nor the assignment of Robbie M. Smith to Plato McCourtney have been recorded. After the Bank parted with the possession of the said note and mortgage, and without any authority from Plato Mc Courtney, the holder of said note and mortgage, Levi Billington had the bank cancel the mortgage on record which was an error.

Robbie M. Smith failed to pay the $1800.00 note given to Plato McCourtney. He reduced this note to judgment and had execution issue thereon, which was returned 'no property found.' Thereupon, Plato McCourtney brough suit against the Billingtons and Feels to foreclose on the $2000.00 note and mortgage that had been assigned to him.

At the time Billington paid Robbie M. Smith the amount due on the note and mortgage she had no authority from Plato McCourtney to receive the money; neither had she the note and mortgage in her possession.

It is the contention of the plaintiff in error that the payment of the full amount of the note by Levi Billington to Robbie M. Smith on the 11th day of October, 1921, ought not to cancel the debt. That such payment is no defense in this action in equity to foreclose the mortgage and collect the amount due under the note and mortgage, or so much thereof as is necessary to satisfy the amount of the judgment that he formerly procured against Robbie M. Smith.

Plaintiff in error cites various cases in its brief and argument where the payment of a note under such circumstances, under the law does not cancel the debt, and that payment without a demand for the note and mortgage is negligence on the part of the payor and he cannot plead payment in an action on the note to recover the same.

In an action at law, no doubt, that is a correct proposition, but this is a suit in equity to foreclose a mortgage. The question arises whether or not the plaintiff in error, under the circumstances in this case is entitled to foreclose his mortgage and have his debt from the mortgaged premises.

In Towner et al., vs. McClelland, 110 App. 592, the following language is used: "Where a mortgage is assigned, and the mortgagor, without notice, pays the payee, who has parted with the note, that will discharge the mortgage, and in suit to foreclose, such payment may be set up in bar of a decree for its foreclosure."

"Payment of the mortgage indebtedness by the grantor in a trust deed to the grantee, without notice that the trust deed has been assigned, is a discharge of the indebtedness, and may be set up in bar of a bill to foreclose the trust deed in the absense of any other facts or circumstances which preclude the mortgagor from presenting such defense."--Therese Gemkow et al., vs. Roman Link, 255 Ill. page 21--Also see 233 Ill. App. 614--where a similar case is discussed, the Court held that while the paymentto the payee did not extinguish the debt, it ought to preclude the holder of the note and mortgage from foreclosing the mortgage in a court of equity.

In Towner vs. McClelland, 110 Ill. page 542 and 551 it is said: "Where a mortgage is assigned, and the mortgager,,without notice,pays the payee, who has parted with the note, that will discharge the mortgage, and in a suit to foreclose, such payment may be set up in bar of a decree for its foreclosure. The mortgager, to release himself from liability on his note, must see that he pays the money to the holder of the note, who has received it by assignment before maturity, but not so to discharge the mortgage, because it is not assignalbe at law. The equitable assignee to protect his rights againstta payment by the mortgagor to the mortgagee, must give the former notice, actual or constructive, of its assignment."

In Naperalski vs. Simon, 198 Ill., page 384, is a case similar to the one at bar, the court said: "This is not a suit at law on a negotiable instrument, but it is a proceeding in equity to foreclose a mortgage,--a non-negotiable instrument,--and must be controlled by equitable principles. It was assignable only in equity, and was subject to the same equitable defenses as if sought to be foreclosed by Schintz on his own behalf. It was the duty of Simon to give notice to the maker of the assignment to him if he would protect himself from payment to the original holder. Such notice would have enabled appellants to protect themselves from the fraudulent representations of Schintz by making payment to the true owner. At all events it would have been in compliance on his part with his duty in the premises. Having failed to give such notice he is in no position to invoke the equitable doctrine that where one of two innocent persons must suffer loss because of the fraud of a third person the loss must fall on him who by his conduct has put it in the power of such third person to make the loss possible. Simon was in fault in failing to give notice of the assignment to him."

In the case at bar there was no notice whatsoever given by Plato McCourtney to any of the makers of the note and mortgage. The appellant claims that, although conceding it to be the law, that there should have been notice given the makers of the note and mortgage, as stated in the cases cited, McCourtney does not stand in the same position as if the payment had been made to the Pope County State Bank, the original payee of the note.

We cannot concede that this is the law. It is conceded that at one time Robbie M. Smith was the legal holder of the note and mortgage, and Levi Billington must have been aware of this fact, otherwise he would not have paid the money to a stranger. If the appellant McCourtney wished to protect his right of

foreclosure of the mortgage in a court of equity, he should have given notice to the makers of the note and mortgage that he was the equitable owner of the same. The payment by the makers of the note and mortgage without notice to the last known owners of the same may be pleaded in bar in a court of equity in a suit to foreclose a mortgage. In equity payment to Robbie M. Smith, the assignee, or to the Pope County State Bank, if the makers of the note and mortgage had no notice of the assignment of the same, would be good as against the assignee, McCourtney.

Under the law and the evidence in this case we hold that the complainant, Plato McCourtney, has lost his right to foreclose his mortgage in a court of equity, and that the trial court committed no error in dismissing his bill for want of equity. The judgment of the Circuit Court is therefore affirmed.

Not to be reported

IN THE

APPELLATE COURT OF THE

STATE OF ILLINOIS.

FOURTH DISTRICT.

October Term, A. D., 1927.

247 I.A. 650

S. E. PHELAN, Appellee.	)	
vs.	)	Appeal from the Circuit Court of Franklin County, Illinois.
ZWICK MERCANTILE CO., Appellant.	)	

Mr. Justice Wolfe rendered the opinion of the Court.

This is an action of assumpsit, originally instituted by the appellee against appellant and one H. M. Zwick, to recover damage for alleged breach of a purported contract of employment, executed by appellant Zwick Mercantile Company by H. M. Zwick, its president, of the one part and S. E. Phelan, of the other part. Sometime thereafter the suit was dismissed as to H. M. Zwick.

The appellee filed in support of his declaration his affidavit of claim; to this declaration and amendments the appellant filed its plea of non-assumpsit, supported by its affidavit of merits. On the trial it was stipulated that all evidence might be introduced under the general issue which could be introduced under any special plea properly pleaded.

The purported contract set forth in haec verba, in the amended declaration, bears date October 24, 1924, and provides in substance, that appellee should enter into the service of the appellant as manager of its stores at West Frankfort and Frankfort Heights, beginning November 3, 1924, and continue for a period of two years, the appellee while so employed being under the control, direction and supervision of appellant, a corporation; that appellee

should have full and complete control over the business of the appellant, subject to the direction of the appellant's board of directors; that the salary of the appellee should be the sum of $50.00 payable weekly, and beginning January 1st, 1925, appellee should receive in addition to said salary, twenty per cent of the net profits of said business, said per centum to be paid as near as may be on the first day of January, 1926, and at the termination of the contract; that, for the purpose of ascertaining the amount due appellee under said twenty per cent net earnings clause, inventory should be taken and had, as near as may be each six months after January 1st, 1925. The declaration alleges a breach by appellant corporation of the conditions of said contract with damages to plaintiff of $25,000.00.

By virtue of this contract the appellee on November 3, 1924, entered into the services of appellant as such manager, and remained such until January 8, 1926, at which time he claims he was wrongfully discharged.

Trial was had by a jury and a verdict rendered in favor of the plaintiff for the sum of $2,128.57. After a motion for a new trial and motion in arrest of judgment were overruled, judgment on the verdict was entered in favor of the plaintiff in the sum of $2,128.57, and an appeal was taken.

The first assignment of error is that the court admitted improper evidence on the part of the plaintiff. The second: That the court below rejected proper evidence on the part of the defendant.

The main objection to the evidence introduced by the plaintiff was relative to the admission of the contract signed by the Zwick Mercantile Co., by H. M. Zwick, its president. The defendant claims that this was not a valid contract for the reason that it had never been ratified by the Board of Directors of the corporation. We are of the opinion that the court properly admitted the contract in evidence. Phelan had been working under the contract for a period of fourteen months. This would be notice to

the officers and directors of the company that he was employed by the company.

"The general rule is that a corporation acts through its president, and through him executes its contracts and agreements; an act pertaining to the business of the corporation not clearly foreign to the general power of the president, done through him, will, in the absence of proof to the contrary, be presumed to have been authorized to be done by the corporate body."--Chicago Pneumatic Tube Co. v. Munsell, et al., 107 Ill. App., page 344; and 124 Ill. App. page 55.

"A corporation can act only through its agents, and the president of a corporation, as the agent and corporate representative, has the power, in the ordinary course of business and in furtherance of the corporate interests, to execute contracts and to bind the company in so doing. He is, by virtue of his office, recognized as the business head of the company, and any contract pertaining to the corporate affairs, within the general powers of such officer, executed by the president on behalf of his corporation, will, in the absence of proof to the contrary, be presumed to have been done by authority of the corporation."

(Atwater v. American Exchange Nat'l Bank, 152 Ill. 605; Bank of Minneapolis v. Griffin, 168 id. 314; Anderson v. South Chicago Brewing Co., 173 id. 213; Anderson Transfer Co. v. Fuller, 174 id. 221; Williams v. Harris, 198 id., 501., Lloyd & Co. v. Matthews, 223 Ill. 480).

Especially in this case should this rule apply as the contract was made in the name of the Zwick Mercantile Company by H. M. Zwick, its president; and H. M. Zwick owned ninety-eight per cent of the stock in the corporation.

The appellee Phelan should not have been permitted to testify over the objection of the appellant that H. M. Zwick agreed to give him $2000.00 for his interest in the business, if appellee would permit Zwick to sell the business to Lewis, etc. What Zwick might be willing to give the appellee for his profits and interest

in the business would be no proof that the corporation actually made such profits.

The contract provided that for the purpose of ascertaining the amount due appellee under the twenty per cent net earnings clause, an inventory should be taken as near as may be each six months beginning January 1st, 1925. One inventory was purported to have been made showing a net profit of $21,000.00 for the first six months. Appellant assigns as error that the trial judge refused to let the defendant prove by the witness C. R. Herzine that this inventory was never approved by the Board of Directors. This was proper evidence and should have been admitted, but it was later admitted so the appellant has the full benefit of such evidence.

Numerous witnesses testified as to the manner in which this inventory was made; some say one way and some another. But, practically, all the witnesses referred to it as a "fake", "inflated", or a "joke inventory"; and from our examination of the evidence we are of the opinion that it is not of sufficient verity that the jury would be justified in allowing the plaintiff anything as net profits as shown by it for the time which it purports to show such profits.

The offer of Zwick to appellee being improperly admitted and evidence on which to estimate the net profits (if any) for the time that the plaintiff was employed by the defendant being insufficient, the finding of the jury of any net profits was erroneous.

Complaint is made as to instructions Nos. 1, 2, 3, 4, and 5, and each of them given by the Court for the plaintiff.

The fourth instruction was proper. It was a question for the jury to decide under all the facts and circumstances in the case, whether the Directors of the Appellant Company knew of the employment under the contract with the Appellee and the conditions under which the appellee was working, and if they had notice of such employment they would be bound thereby.

Appellant criticises the language used in the instructions given by the Court in Nos. 1, 2, and 3, which are similar as to the amount of the damage: "Such sum as you may agree upon from the weight of the evidence, or the plaintiff is entitled to", and insist that the recovery should be based on and confined to such damages as appellee has sustained as shown by the weight of the evidence. Numerous authorities are cited which hold this to be the true rule in the kind of cases therein cited. All of the cases cited by the appellant that hold this to be the true measure of damages are personal injury cases, with the exception of the case of Laporte v. Wallace, 89 Ill. App., 517, which is a suit on a breach of contract to marry. Under all of these cases the plaintiff's damages, if any, are more or less speculative. There was no testimony showing the exact amount the plaintiff would be entitled to recover. The facts being before the jury it would be for them to consider the evidence before them and give the plaintiff such damages as the evidence shows he would be entitled to, which necessarily in each case must be more or less speculative. In the present case the damages, if any, can be estimated accurately in dollars and cents, and would have no speculative elements in it at all. We think that in a case of this kind the instructions informed the jury of the proper measure of damage.

It is assigned as error that appellee's first, second and third instructions submitted questions of law to the jury in that the word "good excuse", "Legal excuse" and "legally entitled to settlement under said contract" submitted a legal proposition to the jury. In Henderson vs. Henderson, 88 App. page 248, it was held that an instruction that left it to the jury to find from the evidence whether the plaintiff was entitled to a separation from her husband permitted the jury to determine of their own notion of right or wrong whether a divorce should be granted, and was "inherently vicious".--Veres vs. Thompson, 66 Ill. page 42, etc.

"The words "good excuse" can only mean a "legal excuse", and a legal excuse presents a question of law. The court should have added instead of "good excuse" if modification was deemed necessary,

added instead of "good excuse" if modification was deemed necessary.

what in law, in the particular instance constituted a 'legal excuse' leaving the jury to find whether the requisite facts were proven; but we do not think the jury should be left to find that a party did or did not have a 'good excuse' for doing or omitting an act without any direction as to what, in law, constitutes a 'good excuse'--Austine v. People, 110 Ill. 248, and McGinnis v. Berman, 16 App. Page 374.

In LaPorte v. Wallace, 89 App. 520, the instruction contained the words 'legal grounds'. The court held that this was leaving to the jury to determine what was a legal excuse which is a question of law to be decided by the trial Judge by proper instructions and not a question of fact for the jury.

In the case of the People v. Mayor of Alton, 193 Ill. 311, the Court says: This instruction is erroneous in submitting to the jury a question of law, by permitting them to pass upon the powers of the city council with reference to the assignment of the school children to the different schools of said city, without the aid of the court. We have repeatedly held it reversible error for the court to give instructions which require the jury to find and determine legal propositions.--Mitchell v. Town of Fon du Lac, 61 Ill. 174; Byers v. Thompson, 66 id. 421; Henderson v. Henderson 248; Austine v. People, 110 id. 248.

In Sexton vs. Barrie, 102 Ill. App. 592-593, the words "without just cause" are used, the court held it reversible error, and say: "If you believe from the evidence in this case that contracts of the character of those in the declaration herein were entered into between the said plaintiffs and the said defendant, and that said defendant has, without just cause, been guilty of breaches thereof, and has prevented the plaintiffs from fully performing said alleged contracts upon their part, then you will find the issues herein for the plaintiffs. We agree, furthermore with the criticism by appellant's attorneys of the words in the instruction "without just cause." As said in Austine v. The People, 110 Ill. 248, 254,

We do not think the jury should be left to find that a party did or did not have a good excuse for doing or omitting to do an act, without direction as to what, in law, constitute a good excuse." Instructions number one, two and three are erroneous and should not have been given.

Appellee's instruction No. 5 is erroneous in instructing the jury that appellee was entitled, if at all, "to his salary for his full unexpired term less whatever sum, if any, said employee may have earned and received from some other employment within a period of the remainder of said contract after discharge." It permits the appellee to recover for the full unexpired term less what he received from other employment and imposes no duty of the appellee to seek other employment. It was the duty of the appellee to make an effort and to use due diligence to obtain other employment.

Appellee contends that instruction No. 10 given for the appellant cures the error in instruction No. 5 of their own and the two must be read as covering the same point. The general rule is that an erroneous instruction that does not direct a verdict followed by one that properly states the law, will cure the error in the first instruction, provided the instructions are of such a nature that the jury could readily see that the two instructions were not in conflict and would not be misled by the giving of the first instruction. No doubt these two instructions would be misleading to the jury. They would have no way of knowing which one they should follow, and the giving of instruction No. 10 for the appellant would not cure the error in instruction No. 5.

For this and other errors as pointed out by the Court the judgment of the Circuit Court is hereby reversed and the cause remanded.

Not to be reported

IN THE

APPELLATE COURT OF ILLINOIS,

FOURTH DISTRICT.

October Term, A. D. 1927.

THE FIRST NATIONAL BANK OF TAMAROA, ILLINOIS, a corporation, Appellant, vs. D. D. HICKMAN, JOHN W. WAISATH, LENA D. WAISATH AND E. F. BARTLE, Appellees.	§	247 I.A. 650 Appeal from the Circuit Court of Perry County.

Justice Fred G. Wolfe rendered the opinion of the Court.

The bill filed by The First National Bank of Tamaroa, Illinois, in said cause is in the nature of a creditor's bill in aid of execution. The bill charges that defendant, John W. Waisath, on the 19th day of September, 1924, was the owner of certain described real estate, viz: One hundred and ten (110) acres in Perry County; that before that time, while he was still owner of said premises he secured a loan from complainant for $1000.00, said note being signed by defendants, D.D. Hickman and John W. Waisath; that the premises were unencumbered; that on the 25th day of February, 1925, the said note was renewed by the said defendants, D.D. Hickman and John W. Waisath.

That on the 19th day of September, 1924, defendant John W. Waisath conveyed to Lena D. Waisath, his wife, the said premises by warranty deed for the consideration of $5.00; that on October 24th, with the intent to defraud the complainant said John W. Waisath and Lena D. Waisath mortgaged the said real estate to defendant, E.F.Bartle, to secure the sum of $1500.00 and interest thereon.

The bill further alleges that on the 17th day of April, 1926, complainant obtained judgment against John W. Waisath and D.D. Hickman in the Circuit Court of Perry County upon said note and that on that date an execution was issued and delivered to the Sheriff of Perry County in the sum of $1,168.33 and levy made on said date by the Sheriff upon the real estate described in the bill.

The bill further alleges that the mortgage to defendant, E.F. Bartle, was a sham made with the intention of defrauding complainant and that no valuable consideration was paid to the said E.F.Bartle, and that John W. Waisath and D.D. Hickman are possessed of no other property except an equity in the property described in the bill, and that said property is worth about $5,000.00 and that they refuse to turn over said property to satisfy the judgment.

The bill prays that the defendants, John W. Waisath, Lena D. Waisath and E. F. Bartle be required to answer under oath; that the said deed and mortgage be set aside, vacated and declared null and void in so far as the interest of the complainant is concerned; that an injunction be allowed restraining the defendants or any of them from disposing of, transferring or encumbering the property, and that the complainant may be authorized to proceed upon its writ of fieri facias or issue another writ and the Sheriff be directed to levy upon, advertise and sell said premises for the payment or satisfaction of said complainant of said judgment, interest and costs. The bill is sworn to.

The answer of John W. Waisath and Lena D. Waisath in substance denies that the defendant fraudulently secured the loan of the complainant, but avers that defendants, D.D. Hickman and John W. Waisath, jointly executed said note. Defendants deny that the deed of John W. Waisath to Lena D. Waisath was executed fraudulently or with the intent to defraud the complainant of any right of protection, but admit that they mortgaged the premises in order to secure a loan of $1,500.00 from defendant, E.F.Bartle, and that said mortgage transaction was made in good faith and avers that the deed and mortgage were promptly placed on record.

Defendants further admit that judgment was taken against D.D. Hickman and John W. Waisath in the Circuit Court of Perry County in vacation by virtue of power of attorney in said note and aver that complainant had no legal right to take the said judgment for the reason that on the 13th day of July, 1925, defendants, D.D. Hickman and John W. Waisath, as partners, filed a petition in the District Court of the United States, Western District of

Illinois, to be adjudged bankrupts; that they filed a complete list of their creditors and a complete inventory of their assets, and the claim of the complainant being included among the list of unsecured creditors; that on the 21st day of January, 1926, they were discharged of all said debts due the complainant and all other debts provable under the bankruptcy law.

Defendants further admit that the execution was issued and levy made on the real estate as stated in the bill but deny that the transfer of property was a sham or made with the intention of defrauding the complainant; also deny that no consideration was passed between E.F.Bartle and the Waisaths to convey said mortgage.

The cause was referred to a special master, who, after hearing evidence and a stipulation of facts, found that the conveyance of John W. Waisath to his wife was fraudulent, but that the complainant is not the proper party to bring the suit to set aside the fraudulent conveyance, and a trustee in bankruptcy is the proper party to bring the suit and recommended that the bill be dismissed for the want of equity, creditors not having the right to institute such proceedings.

Complainant then made a motion for leave to make John O. Harren, who was trustee in bankruptcy in the estate of Hickman and Waisath, complainant in lieu of the First National Bank, which motion was denied. By leave of court John W. Waisath and Lena D. Waisath filed their cross bill to vacate the judgment of the First National Bank of Tamaroa against D.D. Hickman and John W. Waisath, claiming said judgment was a nullity, etc., etc.

A hearing was had upon said cross-bill, and submitted to the Court upon the stipulation of the parties, and the report of the special master.

On hearing by the Court, it was ordered that the judgment entered by confession against the defendants be vacated and held for naught. The Court also found that the conveyance by John W. Waisath to his wife was not made to defraud his creditors; and further found that complainants were not the proper parties to bring suit and denied them leave to substitute John O. Harren, as party complainant, and dismissed the bill for want of equity.

The assignments of error, Numbers 1 and 2 are: The Court erred in

finding that the conveyance in question to Lena D. Waisath by John W. Waisath was not fraudulent.

3d. The court erred in not allowing complainant to substitute John O. Harren trustee in bankruptcy as party complainant.

4th. The Court erred in finding the judgment in question null and void.

5th. The court erred in the dismissal of the bill for want of equity.

We will discuss the third assignment as we feel that a decision of this matter is the controlling factor in the case, and it will not be necessary to discuss the other assignments of error. It is conceded by both parties that the complainant, the First National Bank of Tamaroa was not the proper party to maintain this suit, and without the substitution of some other party the case must necessarily fail.

It is insisted by the appellant that the court erred in not allowing it to substitute as party complainant, John O. Harren, who had been the former trustee in the bankruptcy proceeding in which the former partnership of Hickman and Waisath had been adjudicated bankrupt. After the hearing upon the bill, cross-bill and answer and exceptions to the Master's report, the complainant asked leave to make such substitution.

The only reference in the record to such substitution is in the decree of the Court, which is as follows: "And now comes the complainant in the original bill, by its solicitors, and moves the court for leave to make John O. Harren, <u>who was</u> trustee in bankruptcy of the estate of said Hickman and Waisath during the pendency of said bankruptcy proceedings, party complainant, which motion upon due consideration by the Court is denied."

The defendants objected to such substitution and claim that there is no such trustee to be made party complainant, and arguing from the stipulation which was entered into by the parties before the hearing of the suit, that such stipulation shows conclusively that John O. Harren had been discharged as such trustee, and before there could be any substitution, the bankrupt estate must be reopened and a trustee appointed to act in said estate.

It is insisted that the stipulation "That said bankruptcy proceedings were prosecuted to a final determination in a regular manner, and that the said complainant herein, as one of the creditors of said bankruptcy firm, had notice of all said proceedings and participated therein as above set forth, and that a final order of discharge discharging said firm, was issued by said bankruptcy court to the said firm of Wickman and Waisath as aforesaid on the 21st day of January, A.D. 1926, and that said discharge is in full force and effect", conclusively shows that the trustee had been discharged. The quotation from the stipulation and the decree itself are the only references that are made to the former trustee in bankruptcy.

This motion to substitute a new party complainant was in the nature of a pleading and should be construed most strongly against the pleader.

The motion, no doubt, was made orally as there is no reference to it in the record, the only reference being in the decree, which refers to John O. Harren"Who was the trustee in bankruptcy", and evidently the word "was" used in this connection must be used as in the past tense, speaking of and referring to John O. Harren as an individual who had been such trustee in bankruptcy. Aside from the construction to be placed upon the language used by the court in the decree we are satisfied that giving the stipulation the natural construction that would ordinarily be placed on the language used, we could come to no other conclusion than, "that bankruptcy proceedings had been prosecuted to a final determination in a regular manner" means that the bankruptcy estate had been fully closed and everything had been done that was necessary to carry out and settle said bankruptcy estate, and that the trustee was discharged.

If the complainant desired to make such substitution it was its duty to present to the Court clearly, not only the right to make such substitution, but the party offered to be substituted must be shown to be in existence with a legal right to bring the suit in the capacity in which the substitute was offered. If John O. Harren was not qualified and acting trustee at the time that the offer was made to substitute him as complainant, the Court could not legally allow such substitution, there being no showing that John O. Harren was

the trustee in bankruptcy in said estate of Wickman and Baisath at the time of such offer, the Court properly overruled the motion for such substitution.

Without proper parties complainant before the Court there was no error in dismissing the bill for want of equity.

The judgment of the Circuit Court is hereby affirmed.

Not to be reported

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